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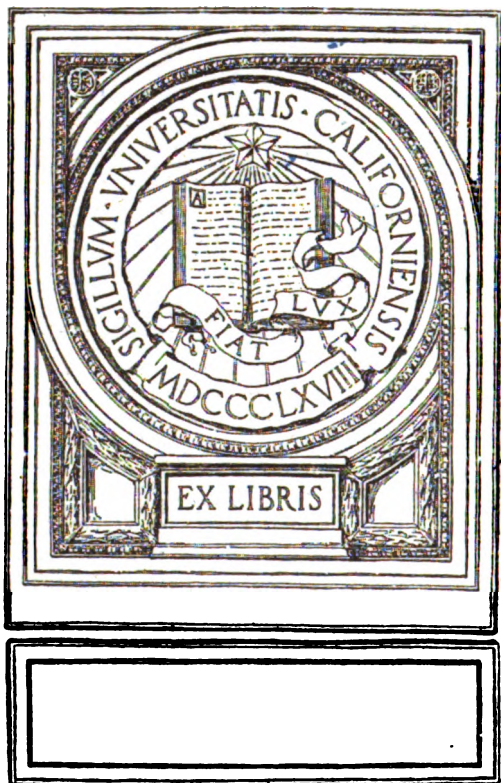
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# OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY

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VOL. IV

THE HISTORY OF CONTRACT IN EARLY ENGLISH  
EQUITY

By W. T. BARBOUR

THE ABBEY OF SAINT-BERTIN AND ITS NEIGHBOUR-  
HOOD, 900-1350

By G. W. COOPLAND

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ALPHOTLIAO

## PREFACE

MR. BARBOUR'S contribution to the Studies is an attempt to characterize with some precision and detail the functions of the Chancery in the fifteenth century. The court was gradually differentiated from the King's Council, and the writs of Edward III's time calling on persons to appear under penalty of a fine or of imprisonment (subpoena), and other special injunctions, are generally framed in terms which leave it undecided whether proceedings were to be taken by the King's Council, or by the Council under the chairmanship of the Chancellor himself with or without the aid of assessors. By the time of Richard II, however, the personal jurisdiction of the Chancellor had acquired a fairly definite range, and was assuming the aspect of a standing institution. Chancery was not a court of record, but it would be idle to deny that it was none the less a court, in the sense of a tribunal taking cognizance of certain juridical disputes and deciding them by peculiar methods of investigation and procedure. The growth of trusts is the most famous expression of this interesting 'ius honorarium', but Chancery also exercised a powerful influence in the sphere of contract, and it is from that particular point of view that its action during the fifteenth century has

been studied by Mr. Barbour. A vast quantity of material was available for that study. Some documents bearing on the subject had seen the light in the specimens of petitions and disclaimers published by the editors of the Chancery Calendars and by Mr. Baildon. But most of the innumerable membranes and papers concerned with these disputes are still lying unstudied and unsifted at the Public Record Office. The early Chancery proceedings for the reigns of Richard II, Henry IV, Henry V, Henry VI, Edward IV, and Richard III number considerably more than 100,000 pieces. It is to be hoped that steps may be taken to classify and to calendar this mass of information, but students can hardly be expected to wait until the necessary funds are forthcoming, and the calendaring has been carried out in a scholarly way by the overworked staff of the Record Office or by competent volunteers. Mr. Barbour has had the courage to plunge boldly into the midst of this enormous heap of documents, and to collect observations from a sufficient number of instances to frame conclusions as to the average methods of Chancery in trying contract cases. The results seem to me to have amply justified his undertaking. The subject may be approached from two distinct points of view. It may be examined as a matter-of-fact treatment of the rights and duties of parties to contractual transactions, and there can be no doubt that it is important to ascertain exactly in what particular cases the Chan-

cellor was expected to grant, and did actually grant, remedies to parties seeking justice before him. When this side of the problem has been examined and solved in one way or another, a second question arises—namely, What was the influence of Chancery practice on the general development of the law of contract in England and, in particular, on the treatment of contracts at Common Law? Thirdly, we may inquire into the connexion between the views held by the Chancellor and their assessors and the doctrines of Canonists and Civilians. Mr. Barbour's monograph is especially concerned with the first of these questions from which any investigation naturally has to start, and which is the condition precedent of all further study of the subject. He has also described, as far as possible, the contrasting methods of treating contractual relations at Common Law and in Chancery. As for the third part of the investigation, it could not be carried out within the limited time at the author's disposal, and he had to content himself with some observations of a general nature. It is to be hoped that the writer may be able to proceed with his analysis in this department also, and thus complete an investigation to which he has already given so much time and thought.

Mr. Coopland's monograph represents the social aspect of our studies. He had opportunities of making himself acquainted with the economic history of a

district of Northern France reclaimed from the sea and from a state of decay by the action of a great ecclesiastical institution and by the advent of peasant colonists, who had to pay various dues and to render many services, but who gradually acquired a secure tenant-right almost equivalent to ownership. An intimate knowledge of topography and natural conditions, and laborious researches into the archives of Northern France, have enabled the writer to trace the stages of this process with exact details, which are necessary in order to unravel the true factors of social development. It is not in the direction of obscure origins that this study has proceeded: questions as to the initial forms of agrarian occupations, the status of the first settlers, the cross-influences of Roman and Teutonic institutions, had to be left for discussion on the broader lines of a comparative study of mediaeval antiquities. But the late Carolingian survey of the possessions of Saint Bertin presents a convenient starting-point for another sequence of facts, namely for the development of Northern France from the manorial system of the *seigneurie* to the work of small peasant farmers which de Tocqueville has described so effectively in his *Ancien Régime*. I should like to call special attention to the curious way in which *morcellement* and *vaine pâture* held their own after the disruption of the regular holdings. It would have been out of the question to encumber the account given of this complicated process by direct comparisons with

the rural history of England : those who take up such a study may be presumed to be acquainted with the main features of this history. It is not by pointing out obvious analogies or contrasts that Mr. Coopland's monograph is helpful to students of social history, but by concrete data in regard to the nature of the French open-field system, of the holdings and their disruptions, of the distribution of capital, of the forms and incidence of revenue assessment, of the peculiarities of land measures, and so forth. Many of these details may be dry and not very easy to follow, but it is only by the help of conscientious studies of this kind that we may hope to substitute precise knowledge and well-founded generalizations for the hazy outlines with which the historians of the peasant class and of rural economy have too often had to content themselves.

PAUL VINOGRADOFF.



VII

THE HISTORY OF CONTRACT IN  
EARLY ENGLISH EQUITY

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## NOTE

THIS essay has been materially abridged in order to bring it within a reasonable length. Had I followed out the plan originally projected, it would have contained an additional hundred pages. Part I stands as originally written ; Part II has been somewhat condensed. I should have liked to include more extracts from the petitions and to submit a greater number of cases, but it seemed desirable to make this study as brief as possible. As it is, I have burdened the text with numerous quotations, but, as the chancery material is not available in published form, a mere reference to a petition by number without indicating its content would not be convincing. I hope, however, that I have not obscured the argument by too frequent quotation.

The chancery petitions are cited by indicating the bundle number in Roman numerals and the number of the petition in Arabic numerals. Thus, XII. 10 means Bundle twelve, Petition number ten.

In the Appendix I have given a few select petitions. They were chosen from among some 500 transcripts which I made at the Public Record Office.

# ANALYSIS

	PAGE
INTRODUCTION: The purpose of this essay . . . . .	9
<b>PART I. CONTRACT IN THE COMMON LAW</b>	
CHAPTER I. INTRODUCTORY . . . . .	11
CHAPTER II. THE COMMON LAW ACTIONS . . . . .	13
<b>Section I. Account.</b> . . . . .	13
Origin and nature of account . . . . .	13
The obligation to account . . . . .	13
Limitations on the action; it succumbs to competition with chancery . . . . .	14
<b>Section II. Covenant and the contract under seal</b> . . . . .	17
I. Action of covenant . . . . .	17
Origin and development . . . . .	17
Limitations on the action . . . . .	18
(1) Required a sealed writing to support it . . . . .	18
(2) Lay only for recovery of damages . . . . .	19
Disadvantages of covenant . . . . .	20
II. Contract under seal . . . . .	20
Effect of attaching a seal . . . . .	21
Strict interpretation of written instrument . . . . .	22
Defences against a deed . . . . .	23
<b>Section III. Debt and Detinue</b> . . . . .	25
Intimate relation between the two actions . . . . .	25
Debt represents an archaic conception . . . . .	26
Debet et detinet: the distinction . . . . .	26
Detinue . . . . .	28
I. Nature of detinue . . . . .	28
Was it founded on contract or on tort? . . . . .	29
II. Limitations on the use of the action . . . . .	33
Debt . . . . .	34
I. Characteristics of the action . . . . .	34
II. Doctrine of <i>quid pro quo</i> . . . . .	36
III. Was agency recognized by the action? . . . . .	38
IV. Proof . . . . .	38
V. Disadvantages of debt . . . . .	39

	PAGE
<b>Section IV. Assumpsit</b>	40
Assumpsit a delictual action perverted from its original purpose	40
Contract and tort : contract in the Year Books	42
Development of assumpsit	44
Action allowed for misfeasance	44
Why does an assumpsit appear in trespass on the case ?	44
Original conception of a tort	46
Extension of the conception	46
Struggle to carry the action from misfeasance to non-feasance	47
(a) In trespass on the case	48
A pivotal case : 14 H. VI. 18-58	49
(b) In deceit	51
' Covenant ' converted into a tort	51
Motives which induced the judges to allow the action to lie for non-feasance	52
Assumpsit becomes a contractual action in 1504	53
Limitation imposed on the action : deceit to the plaintiff	53
<b>Section V. Summary.</b>	54
The defects of the common law in the fifteenth century	55
<b>CHAPTER III. THE DOCTRINE OF CONSIDERATION</b>	59
Two distinct problems in history of parol contract	59
' Consideration ' first appears in sixteenth century in assumpsit	59
Old meaning of the term consideration	60
Theories as to origin of the doctrine	60
I. A modified generalization of the requirement of <i>quid pro quo</i> .	60
Criticism	61
II. Identified with the detriment to the plaintiff in assumpsit	61
Criticism	61
III. A principle imported into the action of assumpsit from equity	63
Criticism	64
Were parol contracts enforced in equity ?	64
Purpose of second part of this essay	65

## PART II. CONTRACT IN EQUITY

	PAGE
<b>CHAPTER I. INTRODUCTORY . . . . .</b>	<b>66</b>
Material upon which this essay is based . . . . .	67
Nature of the early chancery proceedings . . . . .	68
Relative number of cases involving contract . . . . .	69
Absence of answers and indorsements . . . . .	70
Why was it desirable to bring a case in equity ? . . . .	71
Division of the subject . . . . .	72
<b>CHAPTER II. THE SCOPE OF EQUITABLE JURISDICTION IN CONTRACT . . . . .</b>	<b>73</b>
Principle of classification of cases . . . . .	73
<b>Section I. Petitions brought in chancery despite the existence of a remedy at common law in theory . . .</b>	<b>74</b>
Reasons for bringing these cases in equity . . . . .	74
1. The parties . . . . .	75
2. The place where the transaction occurred . . . . .	76
3. Inequality of parties . . . . .	78
(1) Poverty of the petitioner . . . . .	78
(2) Maintenance and power of the defendant . . . .	79
4. Failure of common law process . . . . .	80
Did the chancellor decide these cases on principles of equity and conscience? . . . . .	82
<b>Section II. Petitions relating to obligations under seal . .</b>	<b>84</b>
1. Obligation satisfied, but obligor has no acquittance . .	85
2. Parol condition annexed to a simple (unconditional) obligation . . . . .	90
3. Obligation executed for a specific purpose . . . . .	92
4. Variation of obligation by subsequent parol agreement .	93
5. Inquiry into consideration of obligations . . . . .	96
<b>Section III. Petitions for recovery of 'debts' . . . . .</b>	<b>97</b>
I. Cases in which the law theoretically provides a remedy	98
Reasons for bringing such cases in equity . . . . .	98
II. Cases in which there was no remedy at law . . . . .	100
1. Debt proved by obligation which is lost or destroyed .	100
2. Transactions abroad . . . . .	102

	PAGE
3. Actions against executors . . . . .	102
Must the executor have assets ? . . . . .	104
4. No definite sum agreed upon . . . . .	105
5. Implied promise to pay . . . . .	106
6. Benefit conferred on a third party . . . . .	107
7. Assignment of debts . . . . .	107
Novation distinguished . . . . .	109
<b>Section IV. Petitions for recovery of personal property . . . . .</b>	<b>110</b>
Superiority of the equitable remedy . . . . .	111
<b>Section V. Petitions against vendors of chattels . . . . .</b>	<b>114</b>
1. For non-delivery of the chattel . . . . .	114
2. For breach of warranty . . . . .	115
<b>Section VI. Petitions against vendors of land . . . . .</b>	<b>116</b>
1. Types of cases in which the subpoena is brought . . . . .	117
2. The parties . . . . .	120
3. Relief granted . . . . .	120
(a) Specific performance . . . . .	120
(b) Damages . . . . .	123
<b>Section VII. Marriage Settlements . . . . .</b>	<b>123</b>
1. Types of cases . . . . .	124
2. Parties . . . . .	126
3. Relief granted . . . . .	127
<b>Section VIII. Partnership . . . . .</b>	<b>128</b>
<b>Section IX. Agency . . . . .</b>	<b>130</b>
<b>Section X. Guarantee and Indemnity . . . . .</b>	<b>132</b>
1. Guarantee . . . . .	133
2. Indemnity . . . . .	135
<b>Section XI. Agreements of a general character . . . . .</b>	<b>137</b>
1. Agreements for personal services . . . . .	138
(a) Promise to erect a building . . . . .	138
(b) Carriage and delivery of goods . . . . .	139
(c) Special services . . . . .	140
2. Agreements for the compromise of claims, &c. . . . .	141
(1) Cases of 'award' . . . . .	141
(a) Promise to 'stand by' an award . . . . .	141
(b) Promise to make an award in a particular way . . . . .	141
(2) Agreements concerning litigation . . . . .	142
(3) Performance of a specific act, in general . . . . .	142

	PAGE
<b>CHAPTER III. PROCEDURE AND PROOF</b>	<b>144</b>
I. Procedure	144
The petition. Its character	145
The answer and other pleadings	145
The relief	146
II. Proof	147
Petitioners offer to testify	147
Examination of defendant	147
An illustrative case	148
Method of examination	149
<b>CHAPTER IV. THE THEORY OF CONTRACT IN CHANCERY</b>	<b>150</b>
Absence of remedy at law	151
The motive of the chancellor	152
Reason and conscience	156
Three classes of cases	158
I. Cases in which a party has failed to avail himself of his rights	158
II. Enforcement of parol contract	160
Principles upon which the chancellor acted in enforcing parol contract	163
Conclusion	166
<b>NOTE A: DETINUE</b>	<b>169</b>
<b>NOTE B: TRESPASS SUR LE CAS</b>	<b>170</b>
<b>APPENDIX OF CASES</b>	<b>172</b>
<b>INDEX</b>	<b>235</b>

## INTRODUCTION

THERE is scarcely a subject in legal history which has occasioned more discussion than the history of contract. Particularly in English law it has excited the attention of many able investigators ;<sup>1</sup> and as so much has been written, it may seem presumptuous to undertake to say anything more. The only excuse for such an essay as this is that the material upon which it is based is new and, so far as I am aware, has never been published.

I propose to discuss the history of contract in chancery in the fifteenth century, and I shall base my argument largely upon the petitions which were brought before the chancellor during that period. It is my purpose not alone to show what was actually done in equity, but also to determine so far as possible the principles upon which the chancellor acted. Our chief interest lies in the development of parol contract, but it seemed to me desirable to give some consideration to the contract under seal as well. My reasons for so doing will appear later.

<sup>1</sup> e. g. Holmes, *The Common Law*, Lecture VII ; Pollock and Maitland, *History of English Law*, vol. ii, chap. v ; Ames, *History of Assumpsit*, *Harvard Law Review*, vol. ii, pp. 1-19, 53-69 ; Ames, *Parol Contracts*, *idem*, vol. viii, pp. 252-64 ; Salmond, *History of Contract*, *Law Quarterly Review*, vol. iii, pp. 166-79 ; Salmond, *Essays in Jurisprudence and Legal History*, Essay IV ; Jenks, *The Doctrine of Consideration* (Yorke Prize Essay, 1891) ; Holdsworth, *History of English Law*, vol. iii, chap. iii. See also Holmes, *Early English Equity*, *Law Quarterly Review*, vol. i, pp. 162-74 ; Vinogradoff, *Reason and Conscience in Sixteenth-Century Jurisprudence*, *idem*, vol. xxiv, pp. 373-83.

## INTRODUCTION

This essay then deals chiefly with the development of contract in equity. But it is impossible to consider equitable doctrines alone and by themselves. Their significance is apparent only when they are placed side by side, and contrasted with the doctrines of the common law. Accordingly I have divided this essay into two parts. Part I, which is introductory, gives a brief review of the history of contract in the common law. Part II is an attempt to set forth the equitable doctrines with regard to contract.

# PART I

## CONTRACT IN THE COMMON LAW

### CHAPTER I

#### INTRODUCTORY

THE theory of contract as it existed in the common law must be found in the history of the common law actions. 'So great is the ascendancy of the Law of Actions in the Courts of Justice', remarked Sir Henry Maine,<sup>1</sup> 'that substantive law has at first the look of being gradually secreted in the interstices of procedure.' And so we find it in the common law in the fourteenth and fifteenth centuries. Accordingly I have based the discussion of contract on the actions of Account, Covenant, Debt, Detinue, and Assumpsit. These are practically the only common law actions which had any effect upon the development of the substantive law so far as contract is concerned.

As one looks at the common law as a whole, one must continually notice the insistent testimony which it bears to its feudal origin. This appears in the division of society into classes of men, upon whom certain liabilities are imposed. It will become very evident in our discussion of assumpsit. Again, it is seen in the dominating position given to the land law. For example, in 1285 a new rule was introduced by statute, that an Assize of Novel Disseisin would lie for a corody. A corody is really a benefit derived from contract; yet the right to receive it is treated as if it were a right in land.<sup>2</sup> This situation must have had its effect in the development of contract. I merely wish to call attention to it here.

<sup>1</sup> *Early Law and Custom*, 389 (quoted, Maitland, *Equity*, 295).

<sup>2</sup> See *P. and M.*, ii. 135.

In reviewing the common law I am considering a subject which has been very fully discussed elsewhere. Hence I shall be as brief as possible. I have treated at some length cases which do not seem to have been considered heretofore ; and in one or two places I have sought to put a different interpretation upon cases that are well known. In general, however, what is said here is merely a summary of the work of previous writers.

At the same time I have adopted a different point of view. I have sought to show not so much the efficiency of the common law as its inefficiency ; I have stressed the defects of the actions, and have attempted to set forth the important types of contract for which there was no remedy. In the second place, the study of the common law is not carried beyond the year 1504, when *assumpsit* first obtained general recognition as an action on contract. In that respect it is fragmentary, but it suffices for the present purpose. In equity I have considered only the fifteenth century, and in consequence the contrast is with the common law of the same period. By the action of *assumpsit* the common law was able in the sixteenth century to retrieve its lost jurisdiction over contract, but we are here dealing with an earlier period. In brief, I have treated the common law as a means of approaching chancery, and in this light I have attempted to sketch the history of the different actions.

## CHAPTER II

### THE COMMON LAW ACTIONS

#### SECTION I. ACCOUNT

THE precise moment when the action of Account made its first appearance cannot be fixed with certainty, but one of the earliest known cases in which it was used was in 1232.<sup>1</sup> From that time onward it appears with greater frequency, until at length it succumbed to the competition with chancery; but in the Year Books it is a common form of action. The form of the writ<sup>2</sup> shows that it was modelled upon the proprietary writs; the 'command' was that the defendant should render the plaintiff an account, while the plaintiff in stating his case must show how the liability to account arose, and how and where the money claimed was received.<sup>3</sup>

According to the theory of the common law the action existed for one purpose only:<sup>4</sup> to enforce the obligation to account. It becomes important, therefore, to inquire into the precise nature of this obligation. It was not founded upon contract; rather was it an independent creation of the law itself, and though a bond were conditioned to render an account, it would not support the action unless the necessary conditions which created the obligation to account did exist.<sup>5</sup>

<sup>1</sup> P. and M., ii. 221; Note Book, pl. 859.

<sup>2</sup> 'Precipe A quod iusta et sine dilatione reddat B rationabile compotum suum de tempore quo fuit ballivus suus in C receptorum denariorum ipsius B ut dicit . . .' Pollock, H. L. R., vi. 401. See Maitland, Equity, 382.

<sup>3</sup> e.g. 'Un homme porta un bref d'acompte vers un autre et assigna les resseites par my la mayn un tiel.' Y. B. 11 & 12 Ed. III [R. S.] 315.

<sup>4</sup> For this statement of the obligation to account I am indebted to Langdell, H. L. R., ii. 242-57.

<sup>5</sup> H. L. R., ii. 243, and cases cited.

We may enumerate four essentials, without the concurrence of which the action did not lie : <sup>1</sup>

- (1) The person on whom the obligation is to be imposed must have received property not his own, of which the person imposing the obligation is owner.
- (2) The receipt of the property must not amount to a bailment.
- (3) The receiver must have possession, as distinguished from custody.
- (4) There must be privity between the parties.

It will be obvious, then, that account was confined to a narrow orbit. Indeed, the common law recognized as accountable only three classes of persons: guardians, bailiffs, and receivers, and the extension by statute <sup>2</sup> to the guardian in socage was not a material enlargement. In none of these cases does contract, as such, have any function.

It should be noted, however, that the law was making an attempt, confessedly awkward, to meet the widening demands of commerce. There is some indication in the early cases that primitive arrangements, which to the modern eye suggest partnership <sup>3</sup> or agency, were attempting to take shelter beneath the mantle of account. Thus, where two embarked on a commercial venture, one sought to hold the other to an account for the time when he '*fuit receptor denariorum ipsius A ex quacumque causa et contractu ad communem utilitatem A et B proveniencium*'. <sup>4</sup> In 1340 <sup>5</sup> a plaintiff seeks to compel a defendant to account for money received to trade with. But such instances are comparatively rare. The action never acquired sufficient flexibility to serve any useful purpose for

<sup>1</sup> See more fully H. L. R., ii. 243-8.

<sup>2</sup> Prov. Westm. (1259), c. 12; Stat. Marl. (1267), c. 17, and see Y. B. B. 12 & 13 Ed. III [R. S.] 321; 18 & 19 Ed. III [R. S.] 325 (action does not lie till heir is of full age); 19 Ed. III [R. S.] 449.

<sup>3</sup> In later common law co-partners as such were not accountable to each other (see Langdell, H. L. R., ii. 265, citing Lindley, Partn. [4th ed.] 1022 n. R.), but I am referring to the early cases.

<sup>4</sup> Y. B. 33-5 Ed. I [R. S.] 295.

<sup>5</sup> Y. B. 14 Ed. III [R. S.] 283; and note a curious case in 16 Ed. III (pt. i) 191, where an action was brought against the keeper of a marsh who dug turves and sold them, keeping the profits himself.

merchants or traders, and we note the above cases as exemplifying a tendency, and nothing more.

It is sometimes asserted that Debt, and later *Indebitatus Assumpsit*, superseded Account. Such an assertion rests upon a confusion of ideas; for a *debt* was necessary to support either of those actions, and obviously an obligation to account could not constitute a debt.<sup>1</sup>

Circumstances might of course arise in which the receiver had so dealt with the property<sup>2</sup> that the obligation to account could be treated as having been converted into a debt; in such case the plaintiff would have the option of holding the receiver to account or of waiving the account and bringing debt. Thus, where a receiver granted by deed that he had received £46 of the plaintiff, to be employed to his use, and further granted to repay the £46 to the plaintiff; there account might be brought, or, if the account were waived, debt would lie on the grant to repay.<sup>3</sup> This became important if there were a death on one side; for account would not lie against the executor or heir of the receiver, whereas debt would, provided there were a deed.<sup>4</sup>

The suspension of the action in case of death was a vital defect. Though by statute<sup>5</sup> it was extended in favour of the executor of the obligee, the common law never regarded the executor or administrator of the obligor as answerable in account.<sup>6</sup> Furthermore, damages were not recoverable,<sup>7</sup> nor could a receiver be held accountable for profits,<sup>8</sup> and if the plaintiff counted of a receipt by his own hand, the defendant might wage his law and acquit himself by oath.<sup>9</sup> But, in

<sup>1</sup> The point is fully discussed in *Core's Case*, 28 H. VIII, Dyer, 20 (a).

<sup>2</sup> e. g. by converting it to his own use.

<sup>3</sup> See Y. B. 16 Ed. III (pt. ii) [R. S.] 383.

<sup>4</sup> 'Tut fut ceo a derener par voie d'acompte en sa vie ceo q'il devoit, apres sa mort il ne poet aver accion forsque par voie de dette.' Kershuille J. in Y. B. 16 Ed. III (pt. ii) [R. S.] 383.

<sup>5</sup> 13 Ed. I (Westm. ii), chap. xxiii: and see Coke, 2nd Inst., 404.

<sup>6</sup> Y. B. 16 Ed. III (pt. ii) [R. S.] 383. This was remedied by statute, but not till 1705: 4 Anne, c. 16, s. 27.

<sup>7</sup> Y. B. 14 Ed. III [R. S.] 287 (per Schard J.).

<sup>8</sup> Langdell, H. L. R., ii. 247; Rol. Abr. *Accompt* (o) pl. 14, 15.

<sup>9</sup> Y. B. 13 & 14 Ed. III [R. S.] 289; otherwise where receipt could be proven by deed, Y. B. 16 Ed. III (pt. i) [R. S.] 5.

addition to these technical defects, there was one still more grave. The only adequate remedy was specific performance ; that is, the defendant must be compelled to account ; to the accomplishment of such a purpose the machinery of the common law was ill adapted.<sup>1</sup> Doubtless this occasioned the early intervention of equity ; for in the Bill for account the chancellor had a more efficient remedy.<sup>2</sup>

An application to equity was made as early as 1385.<sup>3</sup> No reason is mentioned for applying to the chancellor, but the explanation may lie in the fact that the complainant was a 'clerc de la Chauncellerie'. Thenceforth appeals to equity become more frequent. In the early cases the complainant usually assigns his poverty,<sup>4</sup> or inability to get hold of the defendant by common law process,<sup>5</sup> as the occasion for coming to chancery ; but at length the subject-matter of an account itself was treated as a sufficient cause.<sup>6</sup>

From this brief consideration of the action, it is apparent that account could do little for the law of contract. Founded upon an obligation which was essentially a creation of the

<sup>1</sup> Sometimes the common law endeavoured to coerce an obstinate defendant by putting him in irons. By statute (St. Westm. ii, c. 10) auditors had power to award a defendant to prison if he were found in arrearages and refused to account. See *Termes de la Ley*, fol. 4 ; in *Y. B. 18 & 19 Ed. III* [R. S.] 413 it was held that a defendant should be put in irons.

<sup>2</sup> A defect in the action arising from its being purely legal is well stated in the words of Mr. Henning : 'The plaintiff in account was compelled to undergo the delay of two distinct trials, the first before a jury to determine his right to an accounting, the judgment for the plaintiff being that the defendant do account (*quod computet*), and the second trial being the accounting itself before the court-appointed auditors.' *Anglo-Am.* iii. 350.

<sup>3</sup> III. i (10 S. S. 1).

<sup>4</sup> XI. 358 (where a complainant says that because of his poverty and the defendant's wealth he has no power to sue the common law).

<sup>5</sup> Thus in VI. 168 it is alleged that the defendant 'luy purpose de passer hors de jurisdiccon dicest Royalme', and by no process of law can he be restrained. The prayer asks for a writ of subpoena in a penalty of £1000.

<sup>6</sup> It is not always easy to distinguish Bills for accounting from other applications ; for commonly the relief sought is 'general', i.e. the complainant trusts to the chancellor's discretion. See VII. 186 ; IX. 382. If the true intent of XVII. 335 (10 S. S. 107) is to have an account, it would seem that the common law requirement of privity was not strictly enforced in equity. However, the jurisdiction of equity in account is scarcely within the range of this essay.

law, and restricted even within its narrow sphere by procedural disadvantages, it could not be the source of any important substantive doctrine. For the common law theory of contract we must look elsewhere.

## SECTION II. COVENANT AND THE CONTRACT UNDER SEAL

### *The Action of Covenant.*

Nothing shows more forcibly the insistent conservatism of the common law than the development of the action of Covenant. Here was an action which drew its name and being from agreement (*conventio*), and remained throughout the early period the most purely contractual action of English law,<sup>1</sup> indeed for two centuries and more the only vehicle for enforcing executory contracts which gave unliquidated damages<sup>2</sup>; and yet when its claims are evaluated it will be found that it contributed very little to the substantive law of contract. Even its position as a contractual remedy was attained only by a struggle.

In England of the early twelfth century the dominating force, juristically considered, was the land law; it is not surprising, therefore, that Covenant first manifests itself in connexion with agreements relating to land. We find it in the earliest extant plea roll,<sup>3</sup> which comes from the reign of John, and by the time of Henry III<sup>4</sup> it was a common form of action and might be had 'as of course'.<sup>5</sup> 'En aancien temps', remarks one of counsel of a later period, 'homme soleit lever fynes par bref de covenant,'<sup>6</sup> a practice which may account for its popularity, but the occasion of its invention was not a desire to simplify conveyance, but to protect the termor. For while the termor had at this time no real right, he was allowed the benefit of a covenant;<sup>7</sup> the need for

<sup>1</sup> Holdsworth, iii. 326.

<sup>2</sup> Holdsworth, ii. 310.

<sup>3</sup> Select Civil Pleas (3 S. S., pl. 89); P. & M., ii. 216.

<sup>4</sup> See Maitland, Register of Writs, H. L. R., iii. 113-15 (especially p. 115, No. 6).

<sup>5</sup> P. & M., ii. 216.

<sup>6</sup> Y. B. 16 Ed. III (pt. ii) 523.

<sup>7</sup> P. & M., ii. 106.

protection of leases brought the writ into existence. Bracton<sup>1</sup> says that it had become the ordinary remedy of the lessee, who might thereby obtain a judgement for specific performance: that he recover possession of the land.

Gradually the action was extended to covenants not relating to land, though in the time of Glanville<sup>2</sup> the king's court showed great reluctance to concern itself with mere private agreements (*privatae conventiones*). By the time of Bracton,<sup>3</sup> however, Covenant was regarded as a general remedy, and any doubt which might have remained was set at rest by the Statute of Wales<sup>4</sup> (1284), where the action is treated as co-extensive with agreements. This looks as if a flexible and elastic contractual remedy had been evolved in the thirteenth century;<sup>5</sup> indeed it had possibilities, which were, however, negatived by two limitations, and its sphere of action was materially restricted.

These limitations are curious, but at the same time characteristic of the common law. The first appears from the rules of evidence, when we inquire as to what was necessary to support the action. Could the plaintiff sustain his case by the production of suit? There is a time (e.g. in the middle period of Edward I's reign)<sup>6</sup> when the judges show some uncertainty, but it was ultimately settled that Covenant could not be maintained without a deed.<sup>7</sup> This decision was fraught

<sup>1</sup> 'Solent aliquando tales cum eiectionis essent infra terminum suum perquirere sibi per breve de conventionione.' Bracton (R. S. ed. Twiss), iii. 468 (bk. iv, chap. xxxvi, fol. 220); and see Digby, Hist. R. P. (5th ed.), 176, 178. See also Y. B. B. 20 & 21 Ed. I [R. S.] 279; 2 & 3 Ed. II [S. S.] 84; 18 & 19 Ed. III [R. S.] 409; 19 Ed. III [R. S.] 17; 20 Ed. III (pt. i) [R. S.] 107; and cf. Y. B. 18 & 19 Ed. III [R. S.] 523.

<sup>2</sup> Glanville, x, cap. 8: 'privatas conventiones non solet curia domini Regis tueri . . .' (*idem*, x, cap. 18).

<sup>3</sup> P. & M., ii. 218, n. 3.

<sup>4</sup> Holdsworth, iii. 325.

<sup>5</sup> Maitland, Equity, 358.

<sup>6</sup> Y. B. 20 & 21 Ed. I [R. S.] 223. Mr. Salmond (Essays in Jurisprudence, 184) cites this case as deciding 'that a writing was the only admissible proof of an agreement'. It is submitted that the case makes no such decision. Witness the dialogue: '*Lowiere*: Quey avez del covenant? *Spigurnel*: Sute bone. *Lowiere*: Avez autre chose? *Spigurnel*: dit ke non. *Lowiere*: Jugement, si nus devum respundre a sa sute sans escrit, &c.' Here the case ends. The reporters leave us uncertain as to the decision, but it was evidently still doubtful whether or no suit would support an action of Covenant.

<sup>7</sup> Y. B. 32 & 33 Ed. I [R. S.] 201; see P. & M., ii. 220, n. 1.

with tremendous consequences. It swept to one side and gave a peculiar character to obligations under seal; it left executory parol contracts helpless until the rise of Assumpsit restored them to their rightful position.

These remarks apply only to the king's court. Though the authority is very meagre, it seems to be pretty clearly established that a different rule prevailed by special custom. In London<sup>1</sup> and probably in Bristol,<sup>2</sup> Covenant lay without a sealed instrument. The origin of this peculiar custom has occasioned much speculation, with which we are not here concerned. We may note in passing, however, that there is some significance in the fact that the custom subsisted in communities which were essentially mercantile and affected by commerce. Perhaps it is more than a coincidence that Covenant without specialty abode in the same county with gavelkind. At all events the special custom had small effect on the substantive law; it never received recognition in the royal courts, and from the frequency with which citizens of London appeal to the chancellor when they wish to bring Covenant but have no deed, one may well doubt whether it ever obtained general recognition.

The second limitation upon the action is so curious as to excite some surprise. Covenant did not lie for a sum certain, but only for the recovery of damages for the breach of a promise in writing. The remedy to enforce a covenant to pay a definite amount of money or chattels was Debt, and not Covenant.<sup>3</sup> Hence though a debt be proved by a writing under seal, Covenant would not lie upon it. This rule persisted till the late sixteenth century, and even in 1613 the

<sup>1</sup> 'And note well that no writ of covenant shal be mayntenable wythout especialty, but in the Cytie of London or in other suche place privileged, by the custome and use.' *Termes de la Ley, sub tit. Covenant*; and see F. N. B., 146 A; *Liber Albus* (ed. Riley), 181, 189. It would seem that the whole transaction must have taken place within the City of London. See XIX. 354 b, XIX. 354 c, *Appendix of Cases*, p. 205, XIX. 493, *ibid.*, p. 209. In Y. B. 48 Ed. III. 6. 11 Candish J. called trespass on the case an 'action de covenant', and said it was maintainable without specialty. There appears to have been some confusion in the learned judge's mind.

<sup>2</sup> *Wade and Bemboe Case* (H. 25 Eliz.), 1 Leon. 2.

<sup>3</sup> Ames, H. L. R., ii. 56.

judges of the Common Bench remarked<sup>1</sup>: 'If a man covenant to pay £10 at a day certain, an action of Debt lieth for the money and not an action of Covenant.' The common law was ever chary of allowing concurrent remedies. There was already in existence an action the function of which was the recovery of specific sums, and the judges consequently restricted Covenant to claims for unliquidated damages.<sup>2</sup>

The advantages and disadvantages of Covenant may be briefly summarized. The proof required was simply the production of the deed itself<sup>3</sup>; and as the action was supported by specialty it lay against the executors or administrators of the original covenantor, and even against his heir if he were named in the covenant.<sup>4</sup> On the other hand, a plaintiff could never recover a greater sum than he claimed<sup>5</sup>; the exact point in which each covenant was broken, and how and wherein damage was sustained, must be stated with great particularity; and the necessity for the assessment of damages required the presence of a jury.

### *The Contract under Seal.*<sup>6</sup>

Our discussion would be incomplete without some detailed consideration of the obligation which was the basis of the action of Covenant—the contract under seal.<sup>7</sup> It is true that the sealed instrument was broader than Covenant, and, as we have already seen, in certain cases would support Debt, but it is proposed for the time being to drop the procedural point of view, and to look at the substantive law.

<sup>1</sup> *Chawner v. Bowes*, Godb. 217 (cited Ames, H. L. R., ii. 56).

<sup>2</sup> '... cety bref de Covenant, ke est naturelement done a recoverir damages...' (Aseby, in Y. B. 21 & 22 Ed. I [R. S.] 183).

<sup>3</sup> e.g. '*Tiltone*: Quey avez de covenant. *Rauf*: Bone escrit.' Y. B. 20 & 21 Ed. I [R. S.] 181 (sp. ref. 183).

<sup>4</sup> Britton, i. 29. 15; Jenks, 162.

<sup>5</sup> Y. B. 16 Ed. III (pt. i) [R. S.] 183.

<sup>6</sup> The discussion of the contract under seal is put here for the sake of convenience. Of course in a great many cases a deed was the basis of the action of Debt. These remarks apply to Debt as well as Covenant, in all cases in which the former was brought on a sealed instrument.

<sup>7</sup> There is a curious remark in the Kentish Eyre (6 Ed. II), wherein a deed (*fet*) is distinguished from a specialty (*especialte*). The plaintiff in support of his claim had introduced a tally. Counsel for the defendant calls the tally a 'deed' and remarks: 'Jugement si par tiel fet qe nest especialte deit estre response.' *Anon. v. Anon*, Y. B. 6 & 7 Ed. II [S. S.] 35.

A distinguished writer has objected to the term 'formal contract' when applied to the sealed writing. 'Consideration', he remarks,<sup>1</sup> 'is as much a form as a seal.' Doubtless this is true to-day, when modern law, especially in the United States, has practically abolished all distinctions between sealed and unsealed writings, but any such proposition would have received scant appreciation from a mediaeval lawyer. His eye never penetrated beyond the seal into the genesis of the contract; to him a deed was more than evidence, it was *the contract itself*.<sup>2</sup>

We are not concerned here with the origin of the doctrine which gave a sacramental importance to the presence of a seal. To be able to write was in the twelfth century a tremendous accomplishment, and any written document was bound to be impressive to the ordinary person. Moreover, the belief certainly existed at this time that the Romans did stipulate by writing, and this belief was fostered by the confused account of 'stipulatio' in the Institutes,<sup>3</sup> wherein substance and proof are hopelessly confounded. Doubtless these elements combined to give peculiar significance to any written document; and apparently such writings were always sealed, for when an attorney or judge speaks of a writing he means a sealed instrument.<sup>4</sup> At all events, the contract under seal attained a peculiar position, of which we must note two consequences.

1. The mere attaching of the seal to a writing bound the party to whom the seal belonged. Even if one carelessly lost his seal,<sup>5</sup> and another made improper use of it, there was no defence. It follows that the use of the seal bound the owner, whether he were actually a party to the contract or not. This

<sup>1</sup> Holmes, 273.

<sup>2</sup> 'En dette sur contract le plaintiff monstra in son count pur quel cause le defendant devient son dettour; autrement in dette sur obligation, *car Pobligation est contract in luy mesme*.' Bellewe, 8 Rich. II, 111 (ed. 1869); see Salmond, *Anglo-Am.*, iii. 323, n. 2.

<sup>3</sup> Institutes, iii. 21; see Girard, *Manuel élémentaire de Droit romain* (4th ed.) 500. Of course in Roman law the written instrument does not bind; it is merely evidence, and the binding force comes from the stipulation which it attests. Thus Paulus, Dig. xlv. 7. 38 'non figura litterarum, sed oratione, quam exprimunt litterae, obligamur.'

<sup>4</sup> See Williams, R. P. (20th ed.), 149-50, and authority there cited.

<sup>5</sup> Glanville, x. 12. But cf. Britton, i. 29. 21.

situation is well illustrated by a case in 6 Ed. II, *Bokelande v. Leanore*.<sup>1</sup> An agreement was made between one Peter the Mason and John Bokelande (the plaintiff) that the said Peter should build two mills for the plaintiff. When the deed which recited the transaction was read, it appeared that the original agreement was made between Bokelande and Peter the Mason only, but that for greater security the names of Roger Leanore and others were added, and that they affixed their seals. Obviously this was a clumsy attempt to produce a relation of suretyship. The mills were not built according to the covenant, whereupon the plaintiff sued a writ of Covenant against Roger Leanore, who objected that he was not a party to the contract, and that he attached his seal only 'for further security'. Spigurnel J. disposed of this defence summarily and said: 'Si un home se oblige a vous en dette par escrit et die en l'escrit, "et a greignour surte ieo troef un tiel qe se oblige" et il met le seal al escrit, *coment q'il ne parlent pas ceo* que l'autre parle, il afferme par le mettre du seal, par quei responez au fet.' The judge, arguing from the analogy of a covenant to pay money, compelled the defendant to answer to the deed. He could not contradict by extrinsic evidence what he 'affirmed' by his seal. There could scarcely be a better example of the strict and relentless logic of the common law.

2. The second consequence is really only another phase of the first. The written instrument was interpreted very strictly; the obligor was taken to mean exactly what he said. As he could not show that he was not a party to the contract, if he had attached his seal, so he could not deny nor explain anything he had written. 'By a writing,' says Fleta,<sup>2</sup> '... any one will be bound, so that if he has written that he owes it, *whether money was paid or not*, he is bound by the writing, and he will not have an *exceptio pecuniae non numeratae* against the writing, because *he said he owed the money*.'<sup>3</sup> Fleta is not a compelling authority, but his statement finds support in the

<sup>1</sup> Y. B. 6 & 7 Ed. II [S. S.] 9.

<sup>2</sup> Fleta (Selden), ii. 56, § 20.

<sup>3</sup> Bracton makes practically the same statement; see f. 100 b.

**Year Books.** A promise to pay money was enforceable though conditional upon the happening of an impossible event, as some defendants, who wrote not wisely but too well, must have learned to their cost. Indeed such a situation was explained by the use of a delictual maxim, when a reporter<sup>1</sup> remarks: 'Note that the Law will suffer a man of his own folly to bind himself to pay on a certain day if he do not make the Tower of London come to Westminster; whereof said Beresford C. J.: "*Volenti non fit iniuria*"<sup>2</sup> although the written law says, *Nemo obligatur ad impossibile*.'" We thus see that the fundamental principle of the sealed writing is its absolute conclusiveness against the obligor.

A graphic illustration of this principle is afforded by a consideration of the defences which might be brought forward. We might better say defence; for there was scarcely more than one real defence. However grievous might have been the misconduct of the obligee in procuring the obligation, it was of no avail to the obligor, save in one case;<sup>3</sup> for the common law made an exception in favour of duress.<sup>4</sup> But fraud,<sup>5</sup> failure of consideration<sup>6</sup> and accord and satisfaction<sup>6</sup> were not pleadable against a specialty. It was, of course, open to the defendant to deny the authenticity of the writing and tender an averment to the country that it was not his deed, a plea technically described as '*nient son fait*'.<sup>7</sup> Otherwise he must show a sealed release or acquittance; for what was

<sup>1</sup> Y. B. 3 & 4 Ed. II [S. S.] 199.

<sup>2</sup> To-day the maxim is interpreted to mean that damage suffered by consent is not a cause of action. Broom, *Legal Maxims*, 217 ff.

<sup>3</sup> Ames, H. L. R., ix. 57.

<sup>4</sup> Britton, i. 29. 20. The mere fact that the obligor made a bond in prison in order to obtain his freedom was not evidence of duress. *Anon. v. Anon.*, Y. B. 6 & 7 Ed. II [S. S.] 36.

<sup>5</sup> Ames, H. L. R., ix. 51. Fraud was not an admissible defence at common law until the Common Law Procedure Act (1854).

<sup>6</sup> Y. B. 3 & 4 Ed. II [S. S.] 145. And though the obligee has already brought suit and recovered, the obligor has no defence, unless he can show acquittance. *Anon. v. Anon.*, Y. B. 6 & 7 Ed. II [27 S. S. 37]. In such a case Shardelow J. said: 'He charges you by an obligation; why then was it not cancelled? (i. e. in the previous action). And you do not produce any acquittance of the debt.' Y. B. 17 Ed. III [R. S.] 297.

<sup>7</sup> Y. B. 3 H. IV. 2. 8. Where a seal was '*glue al fait*', the court held it to be suspicious and declared the deed void. Y. B. 7 H. VI. 18. 27.

done by deed could only be undone by deed.<sup>1</sup> 'Quand un homme conust un fait et ne monstra especial matier de voider ceo, le plaintiff ad cause de recouvrer meintenat sans plus.'<sup>2</sup>

Perhaps it was not always so. Some judges, particularly in the early cases, show an inclination to go behind the seal, and allow parol evidence to be introduced. Thus where Debt was brought on a deed to recover £10 for a lease, the defendant was permitted to show that as a matter of fact he had been ousted.<sup>3</sup> This looks like an attempt to apply the doctrine of *quid pro quo* to sealed instruments. In 1292 a plaintiff was allowed to bring Debt for chattels which were given by deed unconditionally, and to aver that the gift was conditional upon the defendant's marrying her.<sup>4</sup> 'Fut ceo la cause du don ke vous la dussez esposer ou non?' was the incisive question put by Metingham J., and issue was joined on the condition. These are early and isolated cases and cannot be said to affect the trend of judicial opinion. If they indicate anything, it is that the rigid enforcement of the general rule produced so much hardship that occasional attempts were made to consider a particular case upon its merits. But there was never any general admission of parol evidence to engraft a condition upon a deed. To do so the defendant must show 'lettre del plaintiff ou enrroulement de court qe porte record'.<sup>5</sup> Parol evidence was of no avail. In *Esthale et Herlison v. Esthale*<sup>6</sup> the defendant bound himself in a simple obligation, but there was a separate defeasance bond, bearing a condition. Both these obligations were delivered to one G. for safe-keeping. The condition was performed, and after G.'s death the obligations

<sup>1</sup> Y. B. 3 & 4 Ed. II [S. S.] 145. 'Rien luy doit' cannot be pleaded against a deed. Y. B. 9 Ed. IV. 48. 3 (continued, 53. 17).

<sup>2</sup> Paston J. in Y. B. 9 H. VI. 37. 12.

<sup>3</sup> Bereford J. said: 'When the Parson ought to have had an estate by the grant of the Prior, he had nothing. (And he drove them to answer over.)' Y. B. 1 & 2 Ed. II [S. S.] 160. See Holdsworth, iii. 327, n. 3.

<sup>4</sup> Y. B. 20 & 21 Ed. I [R. S.] 367. But see Fitz. Abr. *Debt*, 169 (T. 4 Ed. II), where it was held that no evidence of a condition could be introduced 'sans monstre fait del condicion'. If a condition were endorsed on the deed, parol evidence was admissible to prove performance of the condition. Y. B. 20 H. VI. 23.

<sup>5</sup> Britton, i. 29. 22.

<sup>6</sup> Y. B. 6 & 7 Ed. II [S. S.] 19 [22].

came into the hands of his executors, one of whom was an obligee in the simple obligation. The executor brought suit against the defendant, who endeavoured to set up the condition. Then ensued the following dialogue :

*Spigurnel J.* : Ou est le fet devenuz qe tesmoigne la condicion ?

*Malmerthorpe* : Geoffrei l'avoit en garde et nous avoms bille pendaunt vers ses executours, cesti Reynaud (*the plaintiff*) et altres, de cel escrit et des autres.

*Spigurnel J.* : Ceo fut folie a lesser vostre bastoun hors de vostre main.

The court refused to stay judgement till the defendant could recover his defeasance bond and put it in evidence, deciding rigidly on principle : ' pur ceo qe J. et R. mettent avaunt le fet Richard de E., q'est simple, et il allegge une condicioun destourtre de la dette et de ceo ne moustre rien &c. ne nul autre chose qe luy peuse valer encountre l'obligacion q'est son fait, si agard la curt qe J. et R. recovere les C li vers Richard de E. et lour damages de C s. et Richard en la merci.' If one had an acquittance and lost it, he would be in the same unenviable position. It was his folly ; the court turned a deaf ear to his plaint.

In the end, we come back to the remark of Lord Bacon : ' The law will not couple and mingle matter of specialty, which is of higher account, with matter of averment, which is of inferior account in law.'<sup>1</sup>

### SECTION III. DEBT AND DETINUE

Debt and Detinue were intimately related, and may profitably be considered together. While it would be venturesome to say that the latter action descended from the former,<sup>2</sup> there was a close connexion between them which was recognized after they had become distinct forms of action ; for Detinue was held to be within the purview of a statute<sup>3</sup> which referred

<sup>1</sup> Bacon, *Maxims of the Law*, Reg. 25 [cited, Salmond, *Essays in Jurisprudence*, 57].

<sup>2</sup> See P. & M., ii. 177.

<sup>3</sup> 9 Ed. III, st. 1, c. 3.

in express words to Debt alone. In so deciding, Hillary J. remarked: 'The process is quite the same in Debt and Detinue; and in a plea of Detinue the *essoyn* and warranty of attorney shall be in the words "de placito debiti".'<sup>1</sup> Before we attempt to point out the line of cleavage between the two actions, it will be well to examine the origin and form of the writ of Debt.

Debt represents an archaic conception.<sup>2</sup> The active party appears at first as a demandant rather than a plaintiff, and the action is itself 'petitory'.<sup>3</sup> One claims what is *his own*.

This comes out forcibly in Glanville's statement of the writ of Debt (which was modelled on the *Praeceptum in capite*), where the defendant is ordered to 'render A one hundred marks which he owes him and of which he (i. e. A) claims that he (defendant) *deforces*<sup>4</sup> him'. This suggests that the action is proprietary, and that all distinction between obligation and property is obliterated. It would be dangerous, however, to assert this as a general proposition.<sup>5</sup>

Gradually the word 'deforces' disappears, and the plaintiff asks that the defendant render him so many pounds, &c., which 'he owes and unjustly detains'.<sup>6</sup> We have here Debt in the 'debet et detinet'; it seems better able to express the relation between debtor and creditor.

At the same time a notion is coming to the fore that there are certain cases in which the word 'debet' ought to be used, and certain other cases in which one should say 'detinet' only. 'Debet et detinet' is proper enough so long as the original creditor sues the original debtor, but if there has been a death on either side the word 'debet' is out of place. The representative of the debtor 'detains' money; he does not 'owe' it.<sup>7</sup> If the situation be reversed, and the representative of the

<sup>1</sup> Y. B. 17 Ed. III [R. S.] 141.

<sup>2</sup> Maitland, *Equity*, 332.

<sup>3</sup> P. & M., ii. 207, n. 1 (citing Note Book, pl. 645, 732, 830).

<sup>4</sup> Glanville, x. 3; see Maitland, *Equity*, 332.

<sup>5</sup> Cf. P. & M., ii. 204.

<sup>6</sup> P. & M., ii. 173. And see Britton, i. 29. 12.

<sup>7</sup> 'Nota ke en bref de dette porte vers un homme de autri fet cum ver le heyr de le fet et de le dette le pere ou ver executour de le fet le testatour, ne deyt pas mis le debet mes tout solement le injuste detinet.' Y. B.

creditor sue the original debtor, he must use the 'detinet' alone. The property in the debt was supposed to be in the testator ; it was merely 'detained' from his representative.<sup>1</sup> Curiously enough, the position of the heir was distinguished in some decisions. One of counsel in 1339 remarks that the heir demands a profit which is due to himself and shall say 'debet' ; at the same time care is taken to distinguish the case of the executor.<sup>2</sup> This distinction between 'debet' and 'detinet' is far remote from any idea of obligation.

At the same time an attempt is being made to base the distinction on another ground. Slowly men awake to a nascent perception of obligation ; they begin to discriminate between a *mutuum* and a *commodatum*. The use of 'debet' or 'detinet' is to be determined by the nature of the claim which is sought to be imposed. A reporter<sup>3</sup> in the time of Edward II distinguishes a claim for money (i. e. current coins) from a claim for movable goods ; in the first case one should say 'debet', in the second 'detinet'. It is evident, however, that in the early Year Books this distinction has not obtained a firm footing. Debt in the 'detinet' was brought for £4 due on a sale of goods,<sup>4</sup> money due on a lease,<sup>5</sup> against an abbot for the price of goods bought by his monk,<sup>6</sup> and for twenty shillings in silver.<sup>7</sup> On the other hand, Debt in the 'debet et detinet' was brought to recover sixty marks, where it appears that the

21 & 22 Ed. I [R. S.] 615. See also Y. B. 21 & 22 Ed. I [R. S.] 255. It is not clear that a 'debet' would not lie against the heir. Thus note this dialogue in 1340 :

'*Pole* : Judgement of the writ ; for the writ is in the words "quas debet", whereas against heirs and executors it should be only "detinet".

'*Pult* : It is not so ; against executors it is "detinet" only and against heirs it is "debet et detinet".'

(*Semble*) The writ in the 'debet' against the heir was upheld. Y. B. 16 Ed. III (pt. ii) [R. S.] 383. And note that where one granted for himself and his heirs, a writ in the 'debet' against the heir was upheld. Y. B. 3 & 4 Ed. II [S. S.] 198.

<sup>1</sup> Per Shardelow J., Y. B. 17 & 18 Ed. III [R. S.] 355.

<sup>2</sup> Y. B. 12 & 13 Ed. III [R. S.] 171 (per Trewith).

<sup>3</sup> Y. B. 3 Ed. II [S. S.] 26.

<sup>4</sup> Y. B. 21 & 22 Ed. I [R. S.] 293.

<sup>5</sup> *Anon. v. Anon.*, Y. B. 6 & 7 Ed. II [S. S.] 33.

<sup>6</sup> *Rauldolf v. L'Abbé de Hughes*, Y. B. 6 & 7 Ed. II [S. S.] 32.

<sup>7</sup> *Walewayn v. Rem*, Y. B. 6 & 7 Ed. II [S. S.] 38. (In this case there is no evidence that the plaintiff was seeking to recover the specific coins which were lent.)

plaintiff was demanding certain specific coins as bailor.<sup>1</sup> But at length Debt in the 'debet' drew apart, and the form of action in the 'detinet' became indistinguishable from Detinue. Detinue was recognized as a separate action as early as 1292,<sup>2</sup> and as its province became more clearly defined,<sup>3</sup> it became important to distinguish it from Debt. Both lay to recover chattels or money; for one might *owe* the one as well as the other. Roughly speaking, the distinction was between obligation and property. Where the plaintiff's right was *in personam*, that is, where he was enforcing an obligation to pay money or chattels, the proper remedy was Debt. But if he sought to recover certain *specific* property of which he claimed ownership, Detinue was the proper form.<sup>4</sup>

### *Detinue.*

The importance of Detinue in the law of contract lies in the fact that all bailments were left to its protection, and as the action developed but little, the law of bailment remained practically stationary until Assumpsit superseded Detinue. We are concerned here with two questions relating to the action: its nature, and the limitations imposed upon it.

#### *1. The nature of Detinue.*

We have said that in bringing Detinue the plaintiff was asserting ownership of the chattel claimed. This, however, is a statement which many writers would not permit to pass unchallenged. We cannot consider very fully the perplexing question of the fundamental nature of the action; for the whole theory of the law of movable goods is involved. But on the other hand we cannot ignore it; the mediaeval lawyer's attitude toward bailment is best seen in connexion with the

<sup>1</sup> Y. B. 33-5 Ed. I [R.S.] 455 (The fact that the writ was not challenged excited the attention of the reporter).

<sup>2</sup> Y. B. 20 & 21 Ed. I [R.S.] 189.

<sup>3</sup> Even in the time of Edward III there was still confusion. See Y. B. 17 Ed. III [R.S.] 517.

<sup>4</sup> See Salmond, *Essays*, 176; Salmond, *Anglo-Am.*, iii. 321, and cases cited, Ames, *H. L. R.*, viii. 260, n. 1. And note Y. B. 12 & 13 Ed. III [R.S.] 245 (Detinue for a sealed bag containing £20. The defendant asserted that as the demand was for money, Debt was the proper action. Shardelowe J. supported Detinue, on the ground that the defendant had no power to take the money out of the bag).

action. Was it founded on contract, or was it in a sense proprietary? Was the gist of the action a breach of contract, or a tort? There does not seem to be any categorical answer to these questions.

A very keen student of the common law has asserted that *Detinue* was, in its origin, founded on contract, and that the gist of the action was a breach of contract, namely, the refusal to deliver up the chattel on request, which refusal or unjust detainer was a tort, only in so far as every breach of contract is tortious.<sup>1</sup> This explanation is very simple, and if it is sound it has far-reaching consequences. Much as I hesitate to differ with Professor Ames, I venture to question his conclusion. Before stating reasons for so doing, it is well to examine certain cases.

Y. B. 20 & 21 Ed. I [R. S.] 189. A charter was bailed to one Maud de Mortymer, while she was married; her husband died, and after his death the bailor attempted to bring *Detinue* against the widow. Now it is admitted that a married woman cannot bind herself by contract. The plaintiff, however, contends that she must answer for her tort; 'In this case,' he says, 'the action arises from the tortious detainer, and not from the bailment.' It is unlike *Debt*. The question is debated at some length, but just at the point where one's curiosity is thoroughly aroused, the report ends, and we are at loss to know what was decided.<sup>2</sup>

Y. B. 21 & 22 Ed. I [R. S.] 466. A reporter in a note says that one may count in *Detinue* by alleging that the defendant found the chattel which is claimed (. . . 'la ou meme cele chose ly fut endire . . . la vynt yl (the defendant) . . . e le trova').<sup>3</sup> It is difficult to see what notion of contract is present here.

<sup>1</sup> Ames, *History of Trover*, Anglo-Am., iii. 432-4.

<sup>2</sup> It is believed that Mr. Ames (Anglo-Am., iii. 433) has misunderstood this case. He quotes it as *deciding* that *Detinue* will not lie against a widow for a charter bailed during coverture. The question is discussed—but no definite inference can be drawn. The decision can only be settled by looking up the case in the Rolls, which I regret to say I have not had time to do.

<sup>3</sup> This looks as if *Detinue* by a loser against a finder might have been used at an early date. Ames (Anglo-Am., iii. 439) says that no instance has been found prior to 1371. A reporter's note has not the force of a decision, but it should be noted. Littleton, however, in 33 H. VI. 26. 12 describes the declaration *per inventionem* as a 'new-found Halliday'.

**Y. B. 1 & 2 Ed. II [S. S.] 39.** A son brings Detinue against his father's executors for a bairn's part of his father's goods. The count relies, not upon any bailment, but upon a *usage of the country* (*par usage du pays*). The defendant objected that the writ could not be maintained, because the plaintiff did not show that he bought the goods or bailed them, nor was there any contract, to which Staunton J. replied, 'You must answer to the writ.' The son would seem to have claimed his portion of the goods as his *right*; and he did this through the action of Detinue.<sup>1</sup>

**Y. B. 6 & 7 Ed. II [S. S.] 18.** In Detinue for charters, Stanton J. remarked: 'They have counted that the charters came into your possession as their mother's executor after her death. By what law can you detain these charters, seeing that you do not hold them by the delivery of one who had a right to them . . . ?'

**Y. B. 17 Ed. III [R. S.] 141.** Detinue, for a wife's reasonable portion of her husband's chattels. *Semble*, the action is maintainable. Later a writ 'de rationabile parte' was brought, and it was referred to as 'in the nature of a writ of Detinue' (17 Ed. III, 145).

**6 Hen. VIII (Comyn's Digest, sub tit. Detinue) per Brian J.** The plaintiff must have the general or special property at the time of the action to maintain Detinue.

In most of these cases there was no bailment; but even where the action was ostensibly founded on a bailment, it is not clear that the idea of contract was predominant. A denial of the bailment was not a sufficient answer; the defendant must also deny the detainer.<sup>2</sup> Again, though the plaintiff alleged a bailment, he based his right to recover on his ownership in the thing bailed. This comes out clearly in a case in 1344. Detinue was brought for a horse, bailed by the plaintiff to the defendants' testator. The defendants contended that, as executors, they need not answer without specialty. It was admitted that Debt did not lie against executors without a specialty, and the contention was that the situation in Detinue was the same. In answer, Mowbray said, 'Sir, in

<sup>1</sup> It is admitted that actions of this kind were comparatively rare. More often the plaintiff went to chancery, e. g. IV. 158, *Cases*, p. 174.

<sup>2</sup> Y. B. 20 & 21 Ed. I [R. S.] 193. And see Y. B. 16 Ed. III [R. S.] 167, holding that issue must be taken on the *Detinue* and not on the manner of bailment. See also Y. B. 20 & 21 Ed. I [R. S.] 213.

a writ of Debt, if the debt be recovered against executors, the execution shall always be made of the testator's goods found in the possession of the executors, in which case it is not right that he should recover without a specialty; but now on this writ we are seeking to recover a horse; that is *our own chattel* and not that of the deceased; wherefore . . .' And Sharshulle J. ruled that the plaintiff should be answered without specialty, because '*this action does not arise on obligation*'.<sup>1</sup>

We may now summarize our objections:

(1) Even in the early Year Books, as the cases cited show, Detinue lay where there was no bailment. The son's action for a bairn's share of his father's goods, the wife's claim for a share of her husband's chattels, the action by the loser against the finder, none of these sound in contract. Each is an assertion of the right of ownership as distinct from a right by obligation. Now it is possible that Detinue began as a contractual action, and was later extended to cases where there was no contract. But so far as our evidence goes, this remains unproven. We do know that there are very early cases in which Detinue was brought, where there was no contract. It is incumbent upon supporters of the contractual theory to give some explanation of these actions.

(2) If Detinue '*sur bailment*' were founded on contract, it would follow that the bailor's right was only *in personam*. The fact that Detinue did not lie against a third hand seems to support this. But we know that gradually the bailor did acquire a general property in the thing bailed without the assistance of any statute.<sup>2</sup> In other words, a purely contractual right somehow developed into ownership. This extraordinary transformation of a right *in personam* into a right *in rem* by a process of development is not impossible; but we decline to accept a theory which thrusts so heavy a burden on the common law, unless it be shown that no other is tenable.<sup>3</sup>

<sup>1</sup> Y. B. 17 Ed. III [R. S.] 517 ff. This is not the same thing as saying the '*action does not arise on contract*', but such seems to be the implication.

<sup>2</sup> P. & M., ii. 177.

<sup>3</sup> 'The transformation . . . of the bailor's restricted right against the bailee alone, to an unrestricted right against any possessor of the chattel

(3) In later days Detinue lay against a seller on a bargain and sale. The payment of the purchase money, or the delivery of the buyer's sealed obligation, constituted the *quid pro quo* which supported the action.<sup>1</sup> But the principle was extended farther, so that Detinue lay upon a mere parol bargain of sale, where nothing was delivered to the seller. This might appear to indicate that the buyer was enforcing a personal right against the seller, but the remark<sup>2</sup> of Fortescue C. J. destroys any such notion. Detinue was allowed because the property in the thing sold passed to the buyer; he claimed it as his own.<sup>3</sup>

We have presented only one side of the argument. It cannot be said that Detinue was proprietary, for in the early cases there is convincing evidence that it was not. But the point to be made is this. It is not believed that the mediaeval lawyer had any theory of the nature of Detinue at all. When he wrote text-books, he talked in Roman terms, but when he came into court, he dismissed any theories of substantive law and looked only at procedure. It did not matter whether Detinue sounded in contract or in tort; the primary question was whether it would lie upon a given state of facts. Limitations were imposed on the action, or its sphere was slightly extended, without any thought of the effect upon the substantive law of contract. Indeed, nothing more impresses the student of the Year Books than the absence of general doctrines and the disinclination to make generalizations. In the interest of analytical jurisprudence it may be desirable to frame a theory of the nature of Detinue; but one imposes

bailed, virtually converted his right *ex contractu* into a right *in rem*.<sup>4</sup> (Ames, History of Trover, Anglo-Am., iii. 435.) Mr. Ames seems to assume that because the bailor's right was originally restricted to an action against the bailee alone, that the right must have been *ex contractu*. This does not follow. Nor has the learned writer shown conclusively that Detinue was founded on contract.

<sup>1</sup> Y. B. 21 Ed. III. 12. 2; and see Ames, H.L.R., viii. 259 and cases cited.

<sup>2</sup> 'If I buy a horse of you, *the property is straightway in me*, and for this you shall have a writ of Debt for the money, and I shall have Detinue for the horse on this bargain.' Y. B. 20 H. VI. 35. 4, quoted Ames, H. L. R., viii. 259.

<sup>3</sup> Thus a buyer appeals to equity, alleging that he has no remedy at law because the property in the goods sold never vested in him. The reason was that the vendor had no title. LIX. 185, Cases, p. 230.

such a theory on the early decisions at his peril. Down to the nineteenth century Detinue pursued its mysterious way, continuing to confound judges and lawyers in their speculations as to its origin.<sup>1</sup>

## II. *Limitations in the use of the action.*

(1) If the defendant persisted in retaining the chattel, the common law afforded no means by which its delivery could be compelled. The plaintiff in Detinue had to be content with damages, if worst came to worst; because in the rough generalization of early common law, 'all things may be resolved into damages as an equivalent'.<sup>2</sup> So the law remained till modern times.<sup>3</sup>

(2) In case of bailment the bailor could bring Detinue only against the bailee, or his representative.<sup>4</sup> That is, the defendant's possession must be connected with that of the bailee, 'as by showing that the possessor was the widow, heir, or executor of the bailee, or otherwise in a certain privity with him'.<sup>5</sup> If the chattel passed with or without the bailee's consent into the hands of a third party, the bailor was helpless.<sup>6</sup>

(3) While inability to re-deliver, as through the destruction of the thing, was no defence,<sup>7</sup> still if the bailee wasted or misused the thing bailed, Detinue afforded no remedy.<sup>8</sup>

<sup>1</sup> See Note A, p. 169.

<sup>2</sup> 'Nota. Detinue de chateux. Le pleintif recoveri damages et noun pas le principal, pur ce qe tout court en damages al contra.' 14 & 15 Ed. III. 31.

<sup>3</sup> Ord. XLVIII. v. 1 (R. S. C. 1883) empowers the court or judge to order execution to issue for the delivery of a specific chattel, without giving the defendant the option of retaining the same upon payment of its assessed value.

<sup>4</sup> P. & M., ii. 175. It is a question whether the executor of the bailor could bring Detinue. In VI. 177, appeal is made to equity, and petitioners allege that as they are executors they cannot bring Detinue.

<sup>5</sup> Ames, H. L. R., iii. 33. In Y. B. 16 Ed. II. 490 a plaintiff counted that he had bailed a writing to D. to rebail, &c., 'issint qe apres la mort l'avant-dit D. l'escript devynt en la mayn celui B. . . . ' The writ was brought against B., and Mutford J. remarked: 'Pur ceo qe vous n'avez mye dit coment il avynt a l'escript, ne vous luy fait mye prive a D. come heir, ne come executour, ne en autre manere, si agarde la court qe vous ne preignez rien par vostre breve.' Cf. VI. 245 (10 S. S. 113).

<sup>6</sup> Ames, H. L. R., iii. 33; Y. B. B. 24 Ed. III. 41a. 22; 43 Ed. III. 29. 11.

<sup>7</sup> Y. B. B. 14 Ed. III [R. S.] 35; 20 H. VI. 16. 2.

<sup>8</sup> Ames, Anglo-Am., iii. 441.

(4) In certain cases the defendant might wage his law, e. g. if the plaintiff delivered the article by his own hand.<sup>1</sup>

### *Debt.*

We turn now to a more particular examination of Debt.<sup>2</sup>

#### *I. Characteristics of the action.*

1. The writ of Debt was general. It merely specified that something was due; the form was the same whatever the nature of the claim. The count particularized and made mention of the specific nature of the demand.<sup>3</sup>

2. According to Langdell<sup>4</sup> a debt itself was regarded as a grant; this theory seems to be confirmed by the fact that Debt was the exclusive remedy upon a covenant to pay money, till a late period.<sup>5</sup> Covenant would seem to have been the more natural remedy, but it was restricted to claims for unliquidated damages. A parol grant,<sup>6</sup> however, would not support Debt, except by special custom.<sup>7</sup>

The idea that a debt was a grant throws some light on the conception of Debt itself. The claim in the action was that the defendant owed a certain sum;<sup>8</sup> he was conceived to withhold something from the plaintiff, which it was his duty to surrender.<sup>9</sup> Hence, it followed logically that:

3. The claim must always be for a sum certain.<sup>10</sup> The

<sup>1</sup> Y. B. 16 Ed. III [R. S.] 329. On this ground appeal was made to equity: XI. 427a, *Cases*, p. 187.

<sup>2</sup> In the thirteenth century many actions of Debt were brought, not to enforce a loan, or claim money, but that judgement might be had by default; creditors were using the action as a means of obtaining security before making a loan. This primitive form of security passed out of use with the development of the recognizance and statute merchant. See P. & M., ii. 203-4.

<sup>3</sup> 'Each writ of Debt is general and of one form and the count special and makes mention of the contract, obligation, record, &c.' Colepepper J. in Y. B. 11 H. IV. 73.

<sup>4</sup> Langdell, *Contracts*, § 100.

<sup>5</sup> Ames, *Anglo-Am.*, iii. 279, n. 4, and cases cited.

<sup>6</sup> Y. B. 3 Ed. II [S. S.] 191.

<sup>7</sup> e. g. by custom of London and Bristol. Ames, *H. L. R.* viii. 254, n. 2, and cases cited.

<sup>8</sup> 'Le demand est un dutie et le ground de la action est un dutie.' Y. B. 7 H. VI. 5. 9.

<sup>9</sup> Ames, *H. L. R.*, viii. 260.

<sup>10</sup> Fitz., *Abr.*, *Debt*, 158. See Martin J. in Y. B. 4 H. VI. 19. 5 (cited Jenks, 165), and note remarks of counsel in Y. B. 4 H. VI. 17. 3.

defendant could not owe a duty to pay an uncertain sum ; it must be reduced to certainty. Thus, in case of a sale of goods, the vendee's promise to pay what the goods were worth would not support Debt. 'If I bring cloth to a tailor to have a cloak made', remarked Brian C. J. in 1473,<sup>1</sup> 'if the price be not determined beforehand that I shall pay for the making, he shall not have an action of Debt against me.' Even when Indebitatus Assumpsit first supplanted Debt, it assumed this limitation, which was afterwards removed. This statement is not contradicted by the fact that damages were recoverable, that is, not damages as a sole claim, but damages for the detention of the debt.<sup>2</sup> In many cases the judgement is that the plaintiff do recover his debt and damages,<sup>3</sup> the damages being usually taxed by the court,<sup>4</sup> though if the defendant waged his law and afterwards made default, the plaintiff might recover such damages as he himself alleged in the count.<sup>5</sup>

4. It may be inferred from what has already been said that the action of Debt was wider than contract. It was based upon the duty to pay money or goods, a duty which arose from some source recognized by law.<sup>6</sup> No one thought of a promise as the basis of the action. If money were promised one for making a release, and the release were made, Debt would lie for the money promised ; but it was the act of making the release, the something done, which supported Debt, not the promise to pay.<sup>7</sup> A does not bring an action against B and allege that B promised to pay him ; he says simply that B *owes* him a certain sum, and sets up a *insta causa debendi*, that is, some 'cause' recognized by law by which money is due.

<sup>1</sup> Y. B. 12 Ed. IV. 9. 22 ; Ames, H. L. R., viii. 260.

<sup>2</sup> Of course the plaintiff might bring Debt for damages due as the result of some other action, e. g. damages recovered in a writ of waste (43 Ed. III. 2. 5). But in such cases the amount due was definitely determined, and the defendant's duty to pay arose from the judgement against him.

<sup>3</sup> e. g. Fitz., Abr., *Debt*, *passim* ; *idem* 164 (34 Ed. I).

<sup>4</sup> Where debt was proved by a deed which the defendant could not deny, damages were taxed by the court. Y. B. 1 & 2 Ed. II [S. S.] 91.

<sup>5</sup> Y. B. 12 & 13 Ed. III [R. S.] 119 ; but cf. Y. B. 17 & 18 Ed. III [R. S.] 623. The point may be doubtful.

<sup>6</sup> See The Exposition of the Terms of the Lawes of England, fo. 32-3, (*sub tit.* Debt).

<sup>7</sup> See remarks (*ad fin.*) Y. B. 12 H. VI. 17. 13.

Among such causes were the following: Debt would lie to recover statutory penalties, amercements, forfeitures;<sup>1</sup> arrears of an annuity;<sup>2</sup> a claim against a sheriff for allowing a recognizor by a statute merchant to go at large;<sup>3</sup> arrears of rent service;<sup>4</sup> arrears of a parker's wages;<sup>5</sup> damages recovered in a writ of waste;<sup>6</sup> a debt confessed by a sealed instrument;<sup>7</sup> money lent;<sup>8</sup> price of goods sold;<sup>9</sup> money due from a surety.<sup>10</sup> Instances might be multiplied, but those already given are characteristic.

If we except the cases of Debt on a sealed instrument or some kindred security, it will be found that the action is never brought unless the defendant has received something from the plaintiff. It therefore became possible to deduce a general principle from these typical 'causes' which supported Debt, and this deduction resulted in the well-known doctrine of *quid pro quo*. There was no such requirement where Debt was brought on a judgement or a sealed instrument; but in other cases the action was not maintainable unless a *quid pro quo* were present.

## II. *The doctrine of quid pro quo.*

1. When this generalization was first made cannot be settled with certainty. In 1293<sup>11</sup> there is what appears to be such a generalization, though the technical name is absent; and indeed, under Edward II, Bereford<sup>12</sup> endeavoured to apply the same reasoning to sealed instruments; for we find him peering

<sup>1</sup> P. & M., ii. 210.

<sup>2</sup> Y. B. B. 12 & 13 Ed. III [R. S.] 109; H. 3 H. VI (Fitz., Abr., *Debt*, 16).

<sup>3</sup> Y. B. B. 12 & 13 Ed. III [R. S.] 131; *id.* 355; 18 & 19 Ed. III [R. S.] 65.

<sup>4</sup> Y. B. 17 & 18 Ed. III [R. S.] 63.

<sup>5</sup> Y. B. 17 & 18 Ed. III [R. S.] 623. <sup>6</sup> Y. B. 43 Ed. III. 2. 5.

<sup>7</sup> *Supra*, under Covenant.

<sup>8</sup> P. & M., ii. 211.

<sup>9</sup> Y. B. 21 & 22 Ed. I [R. S.] 293.

<sup>10</sup> But by the reign of Edward III it was settled that a surety could not be held unless he bound himself by deed. Holmes, 264.

<sup>11</sup> Y. B. 21 & 22 Ed. I [R. S.] 293. The plaintiff delivered chattels to the defendant, for which the latter did not pay £4. It was held that the defendant's admission of the receipt of the chattels raised the duty to pay the £4. Thus:

*Metingham J.* 'Pur ceo ke Thomas ad reconu ke yl ressut les chateux de Ricard e yl ne pout dedire le contract entre ly e Ricard, sy agardom ke Ricard recovre le iiij livres ver Thomas,' &c.

<sup>12</sup> Y. B. 1 & 2 Ed. II [S. S.] 160.

behind the seal, and inquiring into the question, Did the defendant get what he bargained for?

In 1338 it is clearly recognized. By covenant between the plaintiff and defendant, the plaintiff was made the defendant's attorney for ten years at 20s. per year. The payment was in arrear, but the plaintiff had no specialty to show for his covenant. Sharshulle J. remarked: 'If one were to count simply of a grant of a debt, he would not be received without a specialty; but here you have his service for his allowance, of which knowledge may be had and you have "*quid pro quo*".'<sup>1</sup> The appearance of the phrase in other actions without technical significance<sup>2</sup> indicates that it was some time before it became a settled term of art.<sup>3</sup>

2. At all events, whatever the date of the enunciation of the doctrine in technical form, it is very doubtful if an action of Debt could ever be maintained in the king's court, unless the plaintiff could show either a specialty, or a *quid pro quo* received by the defendant.<sup>4</sup> By *quid pro quo* is meant some substantial benefit received, and whatever the law could regard as such would support Debt. This is clearly a benefit to the promisor.

3. Suppose, however, the benefit were conferred upon a third party at the request of the defendant. Would Debt lie? At first this was doubted, but at length the reasoning of Moyle J.<sup>5</sup> in its favour made its way, and it became settled

<sup>1</sup> Y. B. 11 & 12 Ed. III [R. S.] 587.

<sup>2</sup> e. g. Y. B. 16 Ed. III [R. S.] 527: in an action of Covenant, there is the remark of Mowbray: 'Quant le Priour se retiret, et puis accorde se prist, cele retrere ne put estre entendu forque pur le covenant ensuant, issint *quid pro quo*.'

Mr. Pike's translation of 'forque pur' as 'in consideration of' is unfortunate, in that it seems to suggest a technical meaning. What is implied is plain enough, namely, that in the process of levying land by fine, the fact that one party retires and permits judgement to go against him, does not mean that he abandons his rights. The prior's retreating is to be interpreted *in the light of* the ensuing covenant. He withdrew in order that he might receive something else in return. This is quite a different thing from the technical generalization in *quid pro quo*.

<sup>3</sup> Salmond says the phrase was first used in 39 Ed. III (in a case unconnected with contract). But this is disproved by the cases cited, which are earlier.

<sup>4</sup> Ames, H. L. R., viii. 254.

<sup>5</sup> In Y. B. 37 H. VI. 8. 18.

law.<sup>1</sup> But it was an essential condition that the defendant, at whose instance the benefit was conferred, should alone be liable; for:

4. One *quid pro quo* would not support two distinct debts.<sup>2</sup> If A requested B to furnish goods to C, and B did so, relying on A's request, B might maintain Debt against A; but it was otherwise if C became personally liable.

III. *Debt might be maintained against a principal on the contract made by his agent*, provided the principal received the benefit; there must be *quid pro quo*, and the *quid* must pass through the agent to the principal.

Thus goods are sold to an abbot by the hand of T, his monk. The monk may be charged in Debt, if the goods went to the profit of the house.<sup>3</sup> It is this which makes the 'simple contract to bind the house';<sup>4</sup> the monk is a mere conduit. In fact, the law of agency is extremely rudimentary; for the only means of bringing suit against a principal was Debt, and in that action the requirement of *quid pro quo* reduced the agent to a nonentity.

#### IV. *Proof.*

1. *Suit or secta.* The plaintiff might produce secta, or transaction witnesses. This practice has been so thoroughly examined elsewhere<sup>5</sup> that it is needless to review it here. It soon became obsolete.<sup>6</sup>

2. *Deed.* A specialty was proof conclusive, and could only be met by a specialty.<sup>7</sup>

<sup>1</sup> Ames, H. L. R., viii. 263. However, it did not become settled law during the fifteenth century (the period considered in this essay), and so far as appeals to equity are concerned may be ignored. In the meantime the rise of Assumpsit had lessened the importance of this principle in Debt. See Holdsworth, iii. 328.

<sup>2</sup> Ames, H. L. R., viii. 263.

<sup>3</sup> Y. B. 33-5 Ed. I [R. S.] 537; Y. B. 6 & 7 Ed. II [S. S.] 32. It was objected that the abbot was not a party to the contract. Bereford C. J. replied: 'Jeo maundrai moun homme al marche, il achatera a mon oepe divers marchandises et il les fra venir a moun hostiel et ieo les dependrai, ne quidez vous qe ieo responde: quod diceret sic.'

<sup>4</sup> '... la conversion de la somme a la oepe de la Measson fait le simple contract de lier la Meason.' Y. B. 20 H. VI. 21. 19.

<sup>5</sup> Holmes, 255 ff.; Jenks, 174-86.

<sup>6</sup> The last case alluding to the practice appears to be Y. B. 13 Ed. III [R. S.] 44, in which it was said that the mention of suit was a mere form.

<sup>7</sup> Y. B. B. 30 & 31 Ed. I [R. S.] 159; 33-5 Ed. I [R. S.] 331; *supra* under Covenant.

## 3. Tally.

(a) Doubtless the difficulty of securing sealed writings opened the way for some simpler mode of proof. This was found in the tally. A tally, however, was not considered a very valuable means of proof, as it was too easy to alter it ; indeed Herle in disparagement referred to it as a mere 'fusselet'.<sup>1</sup>

(b) Except by the law merchant,<sup>2</sup> the defendant might wage his law against a tally.<sup>3</sup> An early case shows an inclination to extend the custom of the law merchant to the royal courts, at least in such cases as concerned merchants,<sup>4</sup> but subsequent decisions do not indicate that the tally was thus favoured.

(4) If the plaintiff could produce neither specialty nor tally, he must show that the defendant had received a *quid pro quo*.

V. *Disadvantages of Debt.*

(1) The claim must always be for a sum certain. Thus damages for the breach of an executory parol contract could never be obtained in Debt.

(2) The plaintiff must prove the precise amount of his claim.<sup>5</sup>

(3) Great particularity was required in the count.<sup>6</sup>

(4) If the plaintiff could not produce a specialty the defendant might wage his law. Wager of law remained a glaring defect of the action.

(5) Wherever wager of law was possible, the action would

<sup>1</sup> '... mais ceo qe vous mettez avant pur especialte n'est qe un fusselet en le quel n'est pas la demand note . . .', per Herle in *Anon. v. Anon.*, Y. B. 6 & 7 Ed. II [S.S.] 35. Herle went on to say that the amount due was indicated only by notches, which might be increased or whittled away at pleasure.

<sup>2</sup> Y. B. 20 & 21 Ed. I [R.S.] 69.

<sup>3</sup> There may have been an exception in favour of a sealed tally. See Y. B. 3 Ed. II [S.S.] 46. As examples of wager of law against a tally, see Y. B. B. 20 & 21 Ed. I [R.S.] 331 ; 20 Ed. III (pt. ii) [R.S.] 449.

<sup>4</sup> Y. B. 21 & 22 Ed. I [R.S.] 457. (Note the remark of Metingham.)

<sup>5</sup> 'If he (i.e. the plaintiff) demanded a debt of £20, and proved a debt of £19, he failed as effectually as if he had declared in Detinue for the recovery of a horse and could only prove the detention of a cow.' Ames, H. L. R., viii. 261.

<sup>6</sup> Ames, H. L. R., ii. 57.

not lie against executors. The deceased might have waged his law, but the executors could not do this for him ;<sup>1</sup> hence the action failed.

#### SECTION IV. ASSUMPSIT

From the foregoing discussion the rigid limitations of the old contract remedies are quite obvious. Agreement, or 'accord', as such played no part in the theory of the common law ; and yet it is inconceivable that the transactions of a busy commercial life could have been satisfied by such meagre recognition. Pressure was being exerted from without ; suitors weary of the ineffectuality of the existing remedies were turning to the chancellor for aid. If the common law were to retain its commercial jurisdiction, the idea of 'contract' must be widened. This is what was done, in effect. But the method was characteristic. No new remedy was invented ; an old one was taken and perverted from its original purpose. The vitalizing force for agreement came from an unexpected source, from an action which sounded originally purely in tort, trespass on the case.<sup>2</sup> The perversion which so vitally

<sup>1</sup> Y. B. 17 & 18 Ed. III [R. S.] 513. Shardelowe J. remarked : 'Quele est la cause en Dette pur quei executours ne resoundront pas saunz especiale de dette due par lour testatour ? Pur ceo qe lour testatour poait aver fait sa ley, et cel respons faut a eux.' And see Holdsworth, iii. 455.

<sup>2</sup> In H. L. R., xlv. 428 (March, 1912), Mr. Deiser puts forward an ingenious theory. He contends that by means of the Statute of Westminster II a remedy was found 'not merely for trespasses, but for all those miscellaneous instances of litigation that did not fall into any well-defined category'. He believes, therefore, that at this early period a remedy was found 'for breaches of covenant or contract in the action on the case'. But there appear to be insuperable objections in the way of this theory.

1. All actions in which an Assumpsit was laid would sound in contract and not in tort. In consequence, Mr. Ames's explanation of the presence of an Assumpsit in Trespass on the case is gratuitous. Mr. Deiser fails to explain why this Assumpsit appears in the early cases, and *disappears* after the idea of tort became widened.

2. All the cases he cites (and he has produced none that are new) are examples of misfeasance. In other words, the breach of contract never takes the form of a mere failure to perform the promise. This is certainly peculiar. If the action were based on the promise, we should certainly expect to find examples of breach by non-feasance.

3. Upon Mr. Deiser's own showing, there are only 52 reported cases of trespass on the case from 1275 to 1471. Bearing in mind the fact that litigants began to appeal to the chancellor in the latter part of the fourteenth century, it seems remarkable that more use was not made of this convenient action (case) if in fact it was available for breach of contract.

affected the law of contract was a branch of this action, and came to be known as *Assumpsit*; but to the end it retained certain indelible marks of its delictual origin.

That the chief contract remedy of the common law should be a delictual action perverted to another use has excited the curiosity and indeed astonishment of many students. But is it, after all, so very extraordinary? Doubtless from our notions to-day it may seem so; but if we inquire into the workings of the mediaeval lawyer's mind, the matter may appear simpler. What was meant by the form '*contract*'? Was agreement a different thing? Was there a sharp line drawn between contract (as we think of it to-day) and tort? It is worth while to look for a moment at these questions before tracing summarily the development of *Assumpsit*.

Perhaps no case more clearly emphasizes the distinction between Debt and *Assumpsit*, or the contemporary notion of contract itself, than an action of trespass on the case which was brought in 1536.<sup>1</sup> This falls without the period considered in this essay, but it may serve as a useful introduction to the earlier cases. The plaintiff had imprisoned one Tatam in the Counter for debt; the defendant came to the plaintiff's wife, the plaintiff himself being away, and '*assumpsit super se al' feme*' that if the plaintiff would discharge Tatam from execution, he (i.e. defendant) would pay the debt '*a tiel jour al' baron, si Tatam ne paia. devant*'. When the plaintiff returned, his wife told him of the defendant's undertaking, whereupon he '*agrea a l'assumption*', and discharged Tatam. Tatam, however, though he rejoiced in his liberty, showed no eagerness to discharge the debt; and then the plaintiff brought his action on the case against the defendant, seeking to charge him on the undertaking. The action was held to be properly brought.

In the count the plaintiff had alleged that defendant '*assumpsit super se al plaintiff...*'; defendant traversed the *assumpsit*, and upon the introduction of evidence, it appeared that the undertaking, as already stated, was made to the wife, in her husband's absence. The defendant seized

<sup>1</sup> Y. B. 27 H. VIII. 24. 3.

upon this 'variance', and made his exception, contending that the wife 'ne poet estre party a tiel assumption sans commandement de son baron devant . . .' This question afforded some difficulty to the judges, but they finally overruled the exception, and then the defendant moved in arrest of judgement, alleging as his chief reason that the action should have been one of Debt. This was the crux of the case. Was there here any 'contract'? What was the basis of this action? Brook thought Debt would not lie in such case as this; for 'on n'aura bref de Dette mes ou un contract est, car le defendant n'ad *quid pro quo*, mes l'action [i.e. in this case] est solement fonde sur l'assumption, que sonne merement en covenant . . .' Spelman J. was inclined to think both Debt and Case would lie; but his reasoning, based on the analogy of the concurrence of Detinue and Case under certain circumstances, is not very convincing. He could not show how the defendant here had *quid pro quo*. FitzJames C. J. adopted Brook's view. His comment is worthy of being quoted at length: 'Donque, s'il aura accion<sup>1</sup> de Dette ou cest accion (i.e. case); et come me semble, il n'aura accion de Det: car icy n'est ascun contract ni le defendant n'ad *quid pro quo*; purque il n'ad autre remedy sinon Accion sur son cas. Comme si un estranger in London eme un piece de drap, et jeo die a le merchant, s'il ne paie vous a tiel jour, jeo paiera; icy n'est ascun contract parentre le merchant et moy, et il n'aura accion de Dette vers moy . . . issint in le cas icy, pur ceo que n'est ascun contract parentre le plaintiff et le defendant, le plaintiff ne poit avoir accion de Dette, mes solement cest accion.' The action was allowed: the motive which led to this result was the thought (of which there is frequent expression in the course of the discussion) that the plaintiff had no remedy 'sinon accion sur son cas'.

What, then, is the significance of the use of the word 'contract'? Why is the 'assumption' so carefully distinguished? We may examine first the use of the word 'contract' in the Year Books.

<sup>1</sup> The Year Book reads 'acre', which is an obvious mistake for 'accion'.

In Fitzherbert's Abridgement one solitary case supports this title, and that was an action of Debt,<sup>1</sup> in which the whole discussion revolved about *quid pro quo*. Counsel and judges take pains to distinguish 'contract' from a sealed writing, an obligation;<sup>2</sup> a grant is not a contract, for it must be by specialty.<sup>3</sup> In early days contract was swallowed up by the larger idea of property, and even in the time of Hale and Blackstone it was treated 'only as a means of acquiring ownership or possession'.<sup>4</sup> But it is used chiefly, one might say almost always, in connexion with the action of Debt.<sup>5</sup> True, we sometimes find a bailment of chattels called a contract,<sup>6</sup> though the use is not common. A sale,<sup>7</sup> and a loan,<sup>8</sup> were the characteristic examples.<sup>9</sup> The association with Debt, and the doctrine of *quid pro quo*, limited the use of the word 'contract' to transactions in which there was the transfer of some material thing. 'In every contract', remarks Coke, 'there must be *quid pro quo*, for *contractus est quasi actus contra actum*.'<sup>10</sup> In general it may be said that the simple contract of the Year Books approaches, though it is not the same as, the Roman 'real contract'; and so, speaking somewhat loosely, we may describe Debt as being founded usually on a real contract. A word of such limitations could scarcely include the idea of agreement; indeed, we do not find the thought of a promise, or consent, playing any part in the law of 'contract'. The 'assumption' which supported Assumpsit was a different thing; and as in the principal case, great care

<sup>1</sup> Y. B. 37 H. VI. 8. 18.

<sup>2</sup> Y. B. B. 17 & 18 Ed. III [R. S.] 73; Fitz., Abr., *Debt*, 83 (H. 35 Ed. III); 3 H. IV. 2. 8; 20 H. VI. 21. 19.

<sup>3</sup> Y. B. 3 Ed. II [S. S.] 191.

<sup>4</sup> P. & M., i. 57.

<sup>5</sup> Debt, of course, lay where there was no 'contract', in the early sense, at all. But the association of the word with Debt explains such anomalous dogmas of English law as a 'Contract of Record'. In the later attempts at generalizing, it seems to have been thought that wherever Debt would lie, there must be a contract, and the term was forced to stagger beneath a load which logic could not have forced upon it.

<sup>6</sup> Y. B. 19 Ed. III [R. S.] 329.

<sup>7</sup> e. g. Y. B. 20 H. VI. 21. 19.

<sup>8</sup> Y. B. 17 Ed. III [R. S.] 7 (at p. 11).

<sup>9</sup> See an instructive note by Ames, *Angl.-Am.*, iii. 306, n. 1.

<sup>10</sup> Co. Lit. 47b. It seems scarcely necessary to say that the etymology is purely fanciful.

is taken to make the distinction.<sup>1</sup> Too much may be made of an argument based upon the use of one particular word ; but it is not a matter of small importance that the idea of contract became enlarged very slowly, and that many agreements became enforceable before they were thought of as contracts at all. The damage which one may sustain from relying upon a promise that is unfulfilled is not so remote from damage resulting from a direct infringement of one's rights by a tort. The ideas may exist side by side ; and that they did so is revealed in the development of the action of Assumpsit.

One of the first cases in which an Assumpsit was laid was in 1348.<sup>2</sup> The defendant undertook to carry the plaintiff's ox safely across the river Humber, but negligently overloaded his boat, with the result that the ox was lost. The objection that no tort was shown was overruled, the court remarking that the trespass consisted in overloading the boat.<sup>3</sup> One who undertook to cure a horse of sickness, but did his work so negligently that the horse died, was also charged in Case in the form of Assumpsit.<sup>4</sup> Case was, however, maintained against a smith for laming a horse where no specific undertaking was laid.<sup>5</sup> All these are cases of active misconduct on the part of the defendant ; the damage resulted directly from his wrongful act. To-day they would be regarded as pure tort ; and the question arises at once why any Assumpsit was laid in the first two cases, and why, in the case of the smith, the writ was adjudged good, though there was no express undertaking to shoe carefully.

The answer is to be found in the primitive conception of liability for a wrongful act. The typical tort was an injury caused to property by a stranger, one who had no authority

<sup>1</sup> e. g. *Prisot J.* in *Y. B. 37 H. VI. 8. 18* asserted that an agreement (or undertaking) to pay the plaintiff 100 marks if he married the plaintiff's daughter was not a contract.

<sup>2</sup> 22 Ass., pl. 41.

<sup>3</sup> 'Il semble qe vous luy fistes tresp' quant vous surcharg' le bateau, par que sa jument perist,' &c. 22 Ass., pl. 41.

<sup>4</sup> *Y. B. 43 Ed. III. 33.*

<sup>5</sup> *Y. B. 46 Ed. III. 19. 19; Fitz., Abr., Case, 49 (T. 46 Ed. III. 19).*

to deal with it in any way.<sup>1</sup> If a person saw fit to place his property in another's care, or to authorize another to do some act with regard to it, any damage which might result from improper action, or failure to act at all, did not raise any liability. The law did not, however, remain stationary in this respect; the narrow notion of liability was extended in two ways:

1. From motives of public policy the law placed certain persons or classes of persons in a peculiar position. Inn-keepers, common carriers, and smiths were required to show a certain amount of diligence in their respective work.<sup>2</sup> It was not necessary that the smith should undertake to shoe carefully. The law imposed upon him the necessity of exercising a proper degree of skill; and this requirement removed the case from the old rule. Gradually this notion was pushed further, so that a smith incurred liability if he refused to shoe a horse, and damage resulted from his inaction, while an inn-keeper who declined to provide food and fodder at his inn<sup>3</sup> became liable in an action on the case. Taverners, vintners, and butchers must sell food of a certain quality; even without representation that it is good, they become liable in 'Deceit' if the food is inferior and damage results.<sup>4</sup>

2. If, however, the person sought to be held liable did not fall within one of these classes into which mediaeval society divided itself, he might still be held to account, under certain conditions.

The reason for stating an Assumpsit is clearly shown in the remarks of the judges in an action<sup>5</sup> brought against a horse doctor for killing a horse by 'contrary medicines', when he had undertaken to cure it. The defendant traversed the Assumpsit, and the question before the court was whether

<sup>1</sup> Ames, H. L. R., ii. 3 ff. Throughout this sketch of Assumpsit I am greatly indebted to Professor Ames's articles in the H. L. R. (vol. ii, pp. 2 and 53).

<sup>2</sup> Holdsworth, iii. 331. And note F. N. B., 94 D: '... it is the duty of each artificer to perform his art duly and truly as he ought.'

<sup>3</sup> 'Nota que fut agree par tout le Court: Que l'ou un Smith denie de ferrer mon cheval ou un Hosteler denie moy d'avoir herbage en son hosterie, j'avera Action sur le case, nient obstant que nul act est fait, car ceo ne sound en covenant.' 18 H. VII, Keilw. 50. 4.

<sup>4</sup> Y. B. 9 H. VI. Mich., pl. 37; Holdsworth, iii. 331, n. 3.

<sup>5</sup> Y. B. 19 H. VI. 49. 5 (1440).

Case would lie, if there were no undertaking at all. It was agreed that it would not ; the traverse to the Assumpsit went to the root of the action. 'Vous n'avez monstre', remarked Paston J., 'q'il est un common mareschal a curer tiel cheval ; en quel cas, mesque il tua vostre cheval par ses medecines, uncore vous n'aurez accion vers luy sans assumption . . .' And Newton C. J. said : 'Si j'ay un malade en ma main et il appon un medecin a ma *heel*, par quel negligence ma main est mayhem', uncore jeo n'aurai action sinon que il assuma sur luy a me curer.' In these early cases the objection was continually raised that the plaintiff should have brought covenant ; 'ceo soun en covenant' is constantly on the defendant's lips, but the objection was overruled. The defendant's undertaking, coupled with damage resulting from his *misdoing* what he had undertaken to do, together constituted the tort to the plaintiff. Or, as the mediaeval lawyer was fond of phrasing it, a covenant was converted by matter *ex post facto* into a tort. The breach of the undertaking was not itself the source of the liability. The promise or undertaking was laid merely to make an act wrongful to which otherwise the law attached no consequences ; it was the damage resulting from the act which was wrongful because contrary to the undertaking which was the gist of the action.

So long as the action on the case in the form of Assumpsit was confined to cases of active misconduct on the part of the undertaker, the action sounded purely in tort. But as one follows the decisions, he notices a constantly recurring attempt to extend the action from damage which resulted from improper action, to damage which ensued from failure to act at all. The thought of the promise is still in the background ; the judges are not troubled by questions of gratuitous promises or promises given for a consideration. Before that question can arise, it must be determined whether Assumpsit will lie for any non-feasance at all, and it is the struggle to carry over the action from misfeasance to non-feasance which stands forth so vividly in the reports. It is this which we may now trace very briefly.<sup>1</sup>

<sup>1</sup> For the sake of brevity, I have omitted the cases involving bailees,

Let us suppose that a carpenter undertakes to build a house, but for some reason fails to begin the work at all. This is pure non-feasance ; is there any remedy ? If the undertaking were under seal a writ of Covenant would lie against him. This thought seems to have been prominently in the minds of the judges. Why, therefore, allow another remedy, when the plaintiff might have protected himself by having a deed ? So when one Lawrence Watton sought to charge Thomas Brinth in Assumpsit because he had undertaken to rebuild certain houses and neglected so to do, Rickhill J. dismissed the action ;<sup>1</sup> the plaintiff had counted on a covenant, and had nothing to show for it. In a similar case,<sup>2</sup> which arose nine years later, the plaintiff argued that if the defendant had built the house badly, he would have his action on the case ; why then should he not be allowed his action where he sustained damage because the defendant had refused to carry out his undertaking ? The court, however, could observe no analogy. In neither of these cases is there any discussion of what the defendant was to receive for his promise.

That it was the question of allowing an action for non-feasance, irrespective of the nature of the promise, which absorbed the attention of judges and reporters is emphasized by the case against one Watkins,<sup>3</sup> mill-maker. The action was trespass on the case for not building a mill ; and the plaintiff counted that the defendant undertook to build him a mill within a certain time, but failed to do so, to the plaintiff's damage in 10 marks. The defendant objected that there was no showing that he was to have anything for his work ; the plaintiff replied that this did not matter. The contention was dismissed lightly, with the suggestion that it must be intended that the defendant would be properly rewarded for his work, and the discussion settled down to a reconsideration of the old problem. Martin J. was convinced that the action could not lie. Case would only lie where some tort was shown ; to fail to act was no tort, and the plaintiff had been

such as Y. B. B. 12 Ed. IV. 13. 9 ; 12 Ed. IV. 13. 10 ; 16 Ed. IV. 9. 7 ;

<sup>2</sup> H. VII. 11. 9.

<sup>1</sup> Y. B. 2 H. IV. 3. 9.

<sup>2</sup> Y. B. 11 H. IV. 33. 60.

<sup>3</sup> Y. B. 3 H. VI. 36. 33 (1425).

able to produce nothing but a promise, which would support an action of Covenant if under seal, but nothing more. He admitted that if Watkins had begun the mill and left it incomplete or built it improperly an action would lie; for doing the work badly converted what was covenant into a tort. 'Mes en le cas al' barr n'est mye issint,' he interjected, 'car la nul tort est suppose par le bref par le fesance d'un chose eins le non-fesance d'un chose etc., le quel sonne seulement en covenant.' Babington C. J. was not so certain. He thought that if one undertook to roof a house, and from his inaction damage resulted, as by rain ruining the timbers, a good cause of action arose. The illustrations which he gave involve non-feasance followed by subsequent damage, and it is obvious that the distinction between non-feasance and misfeasance was beginning to be felt oppressive. Cokayne J. agreed with Babington in favouring the action, but Martin J. kept resolutely to his position, asserting that if this action were maintained, one could bring trespass for the 'breach of any covenant in the world'. All this discussion passed without arriving at a decision; for the parties did not 'demur in judgement'<sup>1</sup> on this question. The defendant, evidently fearing that his contention would not be sustained, proceeded to allege that he had completed the mill a long time after the 'covenant' was made, and that the plaintiff discharged him. Issue was joined thereon, and with that the report ends, leaving us uncertain as to what was decided.

Babington's inclination to allow the action finds support in the dicta of some of the later judges of Henry VI's reign. Apparently strong pressure was being exerted from some source other than the common law. Restricting trespass on the case to misfeasance left parol executory contracts unenforceable; and, after constant attempts to get a hearing at common

<sup>1</sup> Babington C.J. cut short the discussion by saying that it was idle to talk, since the parties had not definitely joined issue. Ames (H. L. R., ii. 11) interprets this to mean that Babington was shaken in his opinion by Martin's remark. I do not think there is any such implication. It is obvious that the defendant did not feel very secure of his position, or he would not so hastily have abandoned it, directly Babington stopped the discussion.

law, disgusted litigants were flocking to the chancellor. It was only a question of time till the distinction should break down, and in 1436<sup>1</sup> Paston and June JJ. agreed in holding that Case in the form of Assumpsit would lie for non-feasance, provided damage ensued from the failure to act.

This decision has been attacked by Professor Ames,<sup>2</sup> as being anomalous, and against all authority. He regards it as an enforcement of a gratuitous parol promise, a decision 'which was made without precedent and had no following'.<sup>3</sup> It is with great reluctance that one ventures to disagree with so learned a student of the common law; but as this may be considered a pivotal case, it is worthy of being examined with care.<sup>4</sup>

All the facts, so far as they are available, are given in the statement of the count: 'Un R suist un bref de trespas sur le cas et counta coment le plaintiff avoit bargaine certain terre pur certain some del defendant et monstre tout en certain, et que le covenaut le defendant fut que il doit faire estraunge person avoir releas a luy deinz certain terme, le quell ne relessa poynt; issint l'accion accrue a luy.' We may note the following points:

1. The use of the word 'covenaut' does not imply a deed; the word was frequently used to describe the undertaking, upon which Assumpsit was based.

2. It is impossible to determine from the report whether or no the undertaking was gratuitous. From a somewhat blind remark of June J. at the conclusion of the case, it is apparent that this 'covenaut' was regarded, not as 'accessory to' the main agreement, but the principal thing itself. It is submitted that the following interpretation is justifiable: the plaintiff 'bargained' land of the defendant 'pur certain some'; this sum was paid or to be paid (we do not know which) in return for the release to be made by a stranger to the plaintiff, without which he could get no title to the land. If such be

<sup>1</sup> Y. B. 14 H. VI. 18. 58.

<sup>2</sup> H. L. R., ii. 10-11.

<sup>3</sup> H. L. R., ii. 11.

<sup>4</sup> As the Year Book report is somewhat unsatisfactory, I have given a complete transcript of the case, taken from MS. Harl. 4557. See Note B, p. 170.

true, the 'covenant' was not gratuitous, and if, as seems not improbable, the money was actually paid, the decision, instead of having no following, is simply an earlier declaration of the principle which was later generally accepted.<sup>1</sup>

3. However, this question of 'consideration' was thrust into the background. The reporters wanted to know if an action were to be allowed for non-feasance; the time-worn argument that the matter sounded in covenant was brought again to the fore. Elleker, as counsel for the defendant, introduced the carpenter and the house that was so long a-building, nor did he forget the case of the smith.<sup>2</sup>

The defendant had undertaken to cause a stranger to release to the plaintiff; this was covenant pure and simple: the writ must abate. Newton replied for the plaintiff, arguing from the analogy of the action for misfeasance. The plaintiff sustained damage in this case, from the defendant's failure to carry out his undertaking; this was parallel to those cases in which the damage resulted from improper action, and the action should be allowed. This argument prevailed upon Paston and June JJ. The principle upon which these two judges acted was that the breach of an undertaking (be it by misfeasance or non-feasance) was actionable, *if damage to the plaintiff ensued*. At last the absurd distinction between misfeasance and non-feasance was broken; Assumpsit was shaking off the shackles of tort and becoming a contract remedy. Not that Paston J. necessarily realized this; but the decision is significant and fraught with great consequences.

<sup>1</sup> It is not asserted that the conclusion reached in this case, namely that Assumpsit would lie for non-feasance, obtained immediate acceptance. The cases which Mr. Ames cites (e. g. Y. B. B. 20 H. VI. 25. 11; 20 H. VI. 34. 4; 21 H. VI. 55. 12; 37 H. VI. 9. 18; 2 H. VII. 11. 9, &c.), to prove that Paston and June JJ. were merely giving effect to an inclination of their own, only show how slowly the notion of an action for non-feasance made its way. But in the famous case in 1504 (Keilw. 77. 25) Frowyk C.J. said: 'If I sell my land, and covenant to enfeof you and do not, you shall have a good action on the case, and this is adjudged.' And yet this failure to enfeof is a mere non-feasance. The difference between the covenant in 1504 and the case at bar is too slight to make a sound distinction. Granted that the reasoning of Frowyk proceeded on different lines, still the two decisions make for the same end.

<sup>2</sup> Elleker's reference to the smith was not peculiarly happy. At all events, in later times the smith was made answerable if he refused to shoe a horse. 17 H. VII, Keilw. 50. 4.

But the principle of the decision was too wide. The common law after much travail had determined to allow an action for non-feasance; it now became necessary to classify non-feasances, to impose limitations. Otherwise it would become impossible to distinguish between agreements which were enforceable and those which were not; 'Pacta sunt servanda' would have been received with a vengeance. The test which was ultimately selected was reached through another line of decisions: the actions of Deceit on the Case. These we may pass in brief review.

In 1429<sup>1</sup> a plaintiff sought to charge a defendant in Deceit, because there was an agreement that the plaintiff should marry the defendant's daughter, and that the defendant should enfeof them of certain land. The daughter was married to another and the conveyance never made. The action failed, but it is noteworthy as showing an attempt to find in Deceit a remedy for the breach of an undertaking. Four years later another plaintiff was more successful. The defendant,<sup>2</sup> for a sum to be paid him, undertook to buy a manor of one J. B. for the plaintiff, but, 'by collusion between himself and one M. N. contriving cunningly to defraud the plaintiff,' disclosed the latter's evidence and bought the manor for M. N. The judges treated this as more than a mere non-feasance; the betrayal of the plaintiff's secrets was an act which amounted to an invasion of his rights;<sup>3</sup> the fraudulent act changed what was Covenant before into a tort. 'Jeo die', said Cotesmore J., 'que mater que gist tout en covenant, par mater ex post facto peut estre convert en deceit; . . . uncore quand il est devenu de Counsail d'un autre, c'est un deceit et changer' tout cest que fuit devant forsque covenant entre les parties, des quel deceit il aura accion sur son cas.'<sup>4</sup>

Suppose there were, however, no 'matter ex post facto' to achieve this miraculous conversion. This was the situation which the court was at length compelled to face, when, in 1442, a bill of Deceit was brought against one John Doight.<sup>5</sup>

<sup>1</sup> Y. B. 7 H. VI. i. 3.

<sup>2</sup> Y. B. 11 H. VI. 18. 10, 24. 1, 55. 26.

<sup>3</sup> Ames, H. L. R., ii. 12.

<sup>4</sup> See Ames's quotations from same case, H. L. R., ii. 12.

<sup>5</sup> Y. B. 20 H. VI. 34. 4.

The plaintiff counted that he had bargained with the defendant to buy land for him for £100 in hand paid, but that the defendant enfeoffed another of the land and so deceived him. So far as the plaintiff was concerned, the defendant was guilty of nothing more than a non-feasance; this act in conveying to another could be no infringement of the plaintiff's rights, unless his undertaking gave the plaintiff some claim against him; for there was no difference, from this point of view, between merely *failing* to enfeoff the plaintiff, and enfeoffing another in his stead. When the case was heard in the Exchequer Chamber, this fact was prominently in the minds of the judges. How in all consistency could the action be allowed? Ascoughe J. was convinced that this was a plain case of Covenant; Case did not lie without misfeasance, which was absent in the case at bar: 'issint en nostre cas, si defendant ust retenu la terre en sa main sans feofment fait, donques le plaintiff n'aura forsque bref de Covenant; *jeo entent tout un cas quand le defendant fist feoffment a un estranger et quand il retient la terre en sa main.*' This was doubtless the conclusion of strict logic; but a majority of the judges thought the action would lie.<sup>1</sup> The motives which impelled them to this conclusion are interesting.<sup>2</sup>

1. The defendant had paid his money; he could not get it back again, nor had he any means of compelling a conveyance of the land at common law. He, therefore, had a strong 'moral' right, which it was difficult for the common law to ignore. It is not certain, though highly probable, that the chancellor recognized such a right at this time; at all events he ultimately held that in such case the vendor stood seised to the use of the purchaser. Jealous of the fast encroaching jurisdiction of chancery, the common law judges were forced to strain every effort to give relief to a plaintiff under such circumstances.

2. But even if the purchase price were not paid, there was a powerful analogy in the law relating to chattels. From the

<sup>1</sup> This cannot be treated as a decision, for the case was adjourned.

<sup>2</sup> For an able statement, upon which I have drawn largely, see Holdsworth, iii. 338 ff.

remark of Fortescue C. J. in this same year,<sup>1</sup> it appears that in the case of sale of a chattel for a fixed price, the vendor had at once his action of Debt for the money, while the vendee might maintain Detinue for the chattel. By a curious logical inversion, Newton C. J. applied this to land: ' . . . quand le plaintiff avoit fait plein bargain ove le defendant, maintenant le defendant purra demander ceux deniers par bref de Dette et *en conscience et en droit* le plaintiff doit avoir la terre, mesque la propriete ne peut passer en luy par ley sans livere del' seisin. Donc ceo serra merveillous ley q'un bargain serra parfait sur que l'un party serra lie par action de Debte et q'il serra sans remedie envers l'autre.'<sup>2</sup> The words 'in conscience and right' come as a strange echo from the chancery.

It is not difficult to detect a flaw in Newton's argument. Inasmuch as the property in land could not pass without livery of seisin, there was no *quid pro quo* to support Debt against the purchaser.<sup>3</sup> The analogy with the sale of a chattel was far from perfect. But law is something more than a sport for logicians, and its development has not always been consistent and harmonious. Fallacious or not, this argument had its effect; the courts, in struggling to give wider scope to the action of Assumpsit, disregarded logic and looked at facts.

By the time of Henry VII it became established that a breach of undertaking by conveyance to a stranger was an actionable deceit.<sup>4</sup> The gap between misfeasance and non-feasance was practically bridged for good and all, when in 1504<sup>5</sup> it was decided that if money were paid for an undertaking, and nothing were done, case in the form of Assumpsit would lie. But a limitation was imposed upon the action; Assumpsit did not lie for all non-feasances, but only when the plaintiff in reliance upon the defendant's promise had incurred a detriment, as, for example, by parting with money. In the beginning of the sixteenth century there is thus found an

<sup>1</sup> Y. B. 20 H. VI. 34. 4; see *supra*, p. 32, note 2.

<sup>2</sup> Y. B. 20 H. VI. 34. 4 (*ad fin.*).

<sup>3</sup> See Ames's criticism, H. L. R., ii. 11, n. 6.

<sup>4</sup> Ames, H. L. R., ii. 13. <sup>5</sup> Keilw. 77, pl. 25.

action which will lie upon parol contract. The subsequent history and development of the action lies outside the limits of this essay.

To summarize : Assumpsit made its appearance about the middle of the fourteenth century. The presence of the undertaking in the delictual action was occasioned by the limited notion of delictual liability. Used at first in cases of misfeasance alone, the action was extended after a prolonged struggle to breaches of undertakings by non-feasance. This was accomplished first in trespass on the case ; the limitation which was ultimately imposed on Assumpsit was reached through Deceit. But Assumpsit in 1504 still remained a delictual action in the theory of contemporary jurists. There was no theory of consideration ; the question of gratuitous promises had not arisen at all. The promise was not definitely recognized as the basis of the action till later. It then became necessary to frame a test whereby the enforceability of promises might be determined, and that test was found in the doctrine of consideration.

#### SECTION V. SUMMARY

We have now to make a brief review of the situation of contract in the common law during the fifteenth century. Assumpsit need not be considered, for it did not become available as a contractual action till 1504. Covenant was useful, but it had no application except to contracts under seal. There remain, then, Account, Detinue, and Debt. From what has been said, it must be obvious that the influence of the first two on the law of contract was very slight. Debt was the contractual action *par excellence*, for all that it gave to the term contract a very limited significance. The 'real contract' was enforced at common law, but all parol agreements which failed to come within its scope went remediless.

If we look for a moment to what the common law did not do, the need for equitable intervention becomes the more apparent. It is somewhat difficult to find a satisfactory scheme of classification which will emphasize this point. The one which follows is open to criticism as a logical division ; but

it is hoped that it may to some extent bring into prominence the 'gaps' in the common law.

I. *No remedy is provided by the common law.*

1. Particular contracts.

(1) Contracts to convey land.

Whether or no the purchase price was paid, the common law afforded no means of compelling conveyance, nor of obtaining damages for failure to convey (unless the promise were under seal).

(2) Marriage settlements.

A promises to give B £50 if B will marry his daughter. It was ultimately settled that Debt would lie, but it is very doubtful if it was available in the fifteenth century. If the promise were to make an estate of land, there was no common law remedy.<sup>1</sup>

(3) Executory contracts for the sale of chattels.

There was no action to recover damages for the breach of such a contract.

(4) Indemnity and Guarantee.

A surety could not be held if he bound himself by parol. Parol promises 'to save harmless' (i. e. promises of indemnity) did not support an action.

(5) Agency.

The contract of agency received very slight recognition. Debt was the only action which could lie against the principal on the contract by his agent, and in such case the principal must always have received *quid pro quo*.

2. The particular contracts mentioned do not exhaust the list; they are chosen merely as conspicuous examples. In short, there was no action whereby one might obtain damages for the breach of an executory parol contract. The large class of contracts which ultimately found support from Assumpsit were left without a remedy.

3. There were certain relations in which parties might stand toward one another that did not fall within the class of express contracts. From such a relation an obligation might arise,

<sup>1</sup> Of course this refers to a *parol* promise.

which natural justice would regard as enforceable, but which was not sufficiently recognized by the common law. As examples we may note contributions between persons liable for the same debt ; or contributions between partners.

II. *Theoretically the law provides a remedy, but it fails in the particular case.*

1. This might arise from difficulties of pleading or proof.

(1) Transactions out of England.

Even if a contract were of such nature that the common law afforded a remedy, the remedy failed if the contract were made out of England. To bring an action at law the venue must be laid in some English county ; this of course was impossible where the transaction took place abroad.

(2) Action against a feme covert.

A married woman could not be held by her contracts at common law. This might present a difficult situation, e. g. see IX. 472, considered *infra*, p. 100.

(3) Actions by one partner or executor against another.

One executor could not sue another at common law ; nor could one partner hold another to account. Partnership, so far as relations between partners is concerned, was largely ignored by the common law.<sup>1</sup>

(4) Loss of an obligation.

If an obligation were lost, stolen, or destroyed, the obligee lost his right of action.

(5) Assignment of a chose in action.

A chose in action could not be assigned at common law so as to enable the assignee to bring suit.

(6) Actions against personal representatives.

Personal representatives could not be held liable for the debt of the deceased, unless it were proved by a deed. Generally speaking, death terminated all liabilities.

<sup>1</sup> Fitzherbert states that one partner might bring Account against another. F. N. B. 117 D. I do not know of any cases in the Year Books which support this statement ; on the other hand, one partner frequently filed a petition in equity against his co-partner, alleging that he had no remedy at law. And see Langdell, Survey of Equity Jurisdiction, H. L. R., ii. 242 ff.

2. Again, it might arise from limitation within the action itself.

(1) In Debt.

(a) A benefit conferred on a third party at the request of the defendant would not support Debt in the fifteenth century.

(b) If it was not definitely agreed how much one should have for a chattel sold, or for work done, Debt would not lie. The *quantum meruit* and *quantum valebant* counts never gained a foothold in Debt,<sup>1</sup> nor were they recognized in *Indebitatus Assumpsit* till 1609.<sup>2</sup>

(2) In Detinue.

(a) When Detinue was brought on a bailment the requirement of privity was strictly enforced. If it were sought to charge some one else than the bailee, his possession must be connected with that of the bailee.

(b) Detinue did not enable the bailor to recover damages for misuse of the thing bailed.

### III. *The remedy at law is insufficient.*

1. Recovery of specific chattels.

The common law afforded no remedy by which the delivery of a specific chattel could be compelled.

The defendant in Detinue could always discharge himself by paying the assessed value of the chattel.

2. Specific performance.

There was no means of compelling specific performance of a contract, and yet in many cases damages proved an inadequate remedy.

### IV. *The remedy at law is difficult or ineffectual.*

1. Taking accounts.

The action of Account was a clumsy method of obtaining an accounting. Common law process and procedure were inadequate to secure the desired end.

2. Set-off.

A defendant might have an adverse claim against the plaintiff, but he could not make use of it at common law by way of set-off.<sup>3</sup>

<sup>1</sup> Ames, H. L. R., viii. 260.

<sup>2</sup> Ames, H. L. R., ii. 58.

<sup>3</sup> 1 Spence, 651.

**V. *Strict interpretation of the contract under seal.***

This topic is somewhat out of place in the present classification, but it is worth while to point out the defects in the law of obligations.

1. Duress, fraud or failure of consideration could not be alleged by way of defence against a deed.
2. Payment, unproved by an acquittance, was not a defence.
3. If an obligation were executed for a specific purpose (not appearing on its face), the fact that the purpose had been accomplished did not afford any defence to an action by the obligee.
4. A condition by parol could not be pleaded against an obligation absolute on its face.
5. An obligation could not be varied by any subsequent parol agreement.

Such were the defects in the law of contract as it existed in common law in the fifteenth century. The question therefore remains: How far were these 'gaps' supplied by the relief granted to litigants in equity?

## CHAPTER III

### THE DOCTRINE OF CONSIDERATION

THE history of parol contracts raises two distinct problems :

(1) How did parol contracts become actionable at all? (2) How did consideration become the test of the enforceability of such contracts ? Before it is possible to classify agreements and determine what are enforceable and what are not, it must be first settled that a contract will support an action. Any classification or generalization is a matter for later consideration. In consequence, nothing but confusion will result if we fail to observe the historical sequence of these two problems.

Now the answer to the first question is to be found in the history of *Assumpsit*. Starting as an action on the case, it was extended after the struggle of a century from cases of misfeasance to cases of non-feasance. Throughout this struggle there appears no theory of contract, nor was it apparent even that the judges considered the promise as the basis of the action. The delictual origin of the action overshadowed its development. The result is that at the beginning of the sixteenth century *Assumpsit* has in fact become an action to enforce parol contract, but such an achievement is not realized by contemporary lawyers. The reason is to be found in the principle upon which the action was allowed. A detriment to the plaintiff was an essential condition to its use ; or, stated differently, a breach of promise supported an action when, and only when, it could be regarded as a *deceit* to the *plaintiff*. There was still a very strong element of tort in the theory of the action.

Some time in the sixteenth century another principle obtained a foothold. Men begin to speak of *consideration*, of promises as made in consideration of some act or forbearance. The early history of this doctrine is wrapped in obscurity. We

do not know how or when it made its first appearance, and there is much dispute as to its source. But we do know that the first use of the word at common law was in the action of Assumpsit, and that ultimately it became settled that no promise was enforceable unless it were made upon a valid consideration.

To-day in the interests of logic it is deemed advisable to resolve every consideration into a detriment to the promisee. Such a definition, however, does not meet the situation in the sixteenth century. The word was then of wider use than it is to-day; for when we now speak of consideration, only a *valuable* consideration is meant.

Historically, consideration seems to have meant any motive or inducement which was sufficient to support a promise.<sup>1</sup> It included such diverse species as (1) a benefit to the promisor, (2) detriment to the promisee, (3) a moral obligation, (4) natural love and affection. All of these are not found in Assumpsit, but it would be a mistake to confine the doctrine to that action. The *quid pro quo* which was essential to Debt became ultimately absorbed by the wider idea. Now in a certain phase, namely as a detriment to the promisee, consideration bears a striking resemblance to the original limitation in Assumpsit, the detriment to the plaintiff. But the question remains, Is this more than an analogy? Is there any historical connexion between the detriment to the plaintiff in Assumpsit, and the detriment to the promisee into which consideration was ultimately resolved? This is the crux of the matter. We may therefore notice three principal theories of the origin of consideration.

I. 'The requirement of consideration in all parol contracts is simply a modified generalization of the requirement of *quid pro quo* to raise a debt by parol.'<sup>2</sup>

This is the theory advanced by Mr. Justice Holmes. But there are great difficulties in the way of its acceptance.

<sup>1</sup> Salmond, *Anglo-Am.*, iii. 331.

<sup>2</sup> L. Q. R., i. 171. And see Holmes, *Common Law*, 258 ff. Mr. Justice Holmes endeavours to connect the requirement of *quid pro quo* in Debt with the secta, and transaction witnesses. For a criticism of this see P. & M., ii. 214, n. 4.

(1) It assumes that the doctrine started from a narrow basis and became widened. Originally a benefit to the promisor, consideration came to embrace the notion of detriment to the promisee. But there is no evidence that this is what happened. Consideration as a rule of contract made its first appearance in the action of *Assumpsit*, and not in *Debt*. If this theory be correct, then the basis of one action must in some way have become the basis of the other. From the sharp line which was always drawn between *Debt* and *Assumpsit*, it seems in the highest degree improbable.

(2) The consideration in *indebitatus assumpsit* was not a modification of *quid pro quo*, but identical with it.<sup>1</sup>

(3) The idea of consideration as a detriment to the promisee never appeared in *Debt*; though repeated efforts were made to extend *quid pro quo* to cover detriment.<sup>2</sup>

For these reasons we must reject this theory. It fails to take recognition of the wide idea embraced in the word consideration; it requires a transformation of *quid pro quo* which was never effected.

II. Another theory is put forward by Professor Ames in a brilliant series of articles in the *Harvard Law Review*.<sup>3</sup> He there identifies consideration with the detriment to the plaintiff upon which the action of *Assumpsit* was founded. This theory has a certain decided advantage. It shows a regular and consistent development in *Assumpsit* culminating in the evolution of the principle of consideration from within the action itself. So far as the *Year Book* cases are themselves concerned it seems impossible of refutation. But the theory is open to the following objections:

(1) It assumes that consideration is identical with the detriment to the plaintiff. As we have already pointed out, there is a strong analogy between consideration when resolved into a detriment to the promisee and the limitation fixed in the action of *Assumpsit*. But this analogy does not mean that the principles are identical. It is submitted that Professor Ames has not demonstrated this identity beyond peradventure.

<sup>1</sup> Ames, H. L. R., ii. 18.

<sup>2</sup> Salmond, *Essays*, 222.

<sup>3</sup> H. L. R., ii, pp. 1 and 53. See also H. L. R., viii. 252-64.

The principles may be extremely close to one another, and yet have no historical connexion.

(2) It does not account for all the species of consideration, such as moral obligation, for example. A moral obligation is no longer a consideration, but it was once. Moreover, a precedent debt was recognized as a valid consideration in *indebitatus assumpsit*. It is difficult to see how a precedent debt can by any contortion be twisted into a detriment to the plaintiff.

(3) This theory rests upon the assumption that the principle of consideration was a creation of the common law pure and simple. So keen is Professor Ames to emphasize this point that he is led to make certain unwarranted assertions with regard to equity. Not only does he contend that 'in equity . . . a remediable breach of a parol promise was originally conceived of as a deceit',<sup>1</sup> but he goes on to say that 'chancery gave relief upon parol agreements *only* upon the ground of compelling reparation for what was regarded as a tort to the plaintiff or upon the principle of preventing the unjust enrichment of the defendant'.<sup>2</sup> We shall take pains to examine both of these statements later on; it is believed that neither of them is correct. If, on the other hand, the Chancellor did exercise a general jurisdiction over parol contracts in the fifteenth century, if in fact he did evolve a principle upon which promises were held binding, it is surely fatuous to suggest that he borrowed this principle from the common law, which did not possess a general contractual action<sup>3</sup> till the sixteenth century. Furthermore, if parol contracts were so recognized in equity, that alone throws considerable doubt upon the correctness of this theory.

(4) It should be noticed, finally, that all the early cases in *Assumpsit* involve a specific undertaking. There is no recognition of agreement or a bargain as such. Indeed, it was found necessary in *Slade's case* to resolve that every contract executory imported an *Assumpsit*. That is to say, the fact of agreement did not of itself 'raise' any undertaking. In

<sup>1</sup> H. L. R., ii. 15.

<sup>2</sup> H. L. R., viii. 257.

<sup>3</sup> That is, an action applicable to parol contracts generally.

consequence we are forced to the position that originally every enforceable contract took the highly technical form of an undertaking. But does this seem a natural way in which a contract should arise? Men make informal agreements or 'accordés' without troubling to incorporate them into a particular form. I venture to suggest that there were many such agreements which fell without the scope of undertakings; that, in fact, the theory which relies upon the 'undertaker' fails to take account of many formless agreements which were the common experience of everyday life.

For these reasons we may question the theory advanced by Professor Ames. We can, however, state our objections with more effect after examining contract in equity.

III. Still another theory is advanced by Mr. Salmond.<sup>1</sup> He refuses to admit that the doctrine of consideration was identical with the detriment to the plaintiff in *Assumpsit*. Rather does he think that it was not 'a logical development from within the action at all, but was a ready-made principle imported *ab extra*'.<sup>2</sup> Now if we go back to the first cases in which *Assumpsit* lay for non-feasance, we find that the detriment to the plaintiff assumed one particular form.

He had parted with money on the strength of the defendant's promise, and that money had been received by the defendant. If, therefore, we shift our point of view, what on the one side appears to be a detriment to the plaintiff may on the other side be regarded as a benefit to the promisor. The theory that a promise is actionable because the promisee has incurred damage by relying upon it is essentially delictual. From the standpoint of contractual theory, a promise should be actionable if there were a sufficient ground for making it, regardless of whether or no the promisee had suffered damage from its breach. But in the specific case we are considering, the two principles amount to different ways of looking at the same thing. A promises to make an estate of lands to B for £50. B pays the money, but A fails to make estate. B has suffered a detriment, because he has parted with £50 on the strength

<sup>1</sup> Salmond, *Essays in Jurisprudence*, Essay No. IV.

<sup>2</sup> *Id.*, p. 212.

of A's promise. On the other hand, there was a sufficient inducement for A's promise, namely the payment of £50. Mr. Salmond's contention is this: Somewhere outside the common law the principle was evolved that a promise was binding if there were a 'legally sufficient motive or inducement for making it'.<sup>1</sup>

Now the promises which were first enforced in *Assumpsit* were only such as had a legal inducement; for the promisor had always obtained a direct benefit by the payment of money. It therefore became possible that the one principle should be substituted for the other. In short, the doctrine of consideration, already evolved, was thrust into the action of *Assumpsit* from without; and its entrance into the action was facilitated by the strong analogy which it bore to the limitation already engrafted on *Assumpsit*. This 'introduction of a foreign principle 'breaks the logical continuity of the development' of the action.

This theory is certainly plausible. But it leaves two questions unanswered:

(1) How and when did consideration gain its entrance into *Assumpsit* if it came from without? This Mr. Salmond does not answer satisfactorily. Indeed, it is doubted whether this question can be answered at all. The reports do not show effectively the manner of appearance of consideration. In fact the doctrine is at first shrouded in mystery which it is very difficult to pierce. But if consideration was somewhere recognized as a principle before it was adopted in *Assumpsit*, the presumption that it was introduced from without becomes very strong. We therefore ask:

(2) Whence came the doctrine of consideration? Mr. Salmond asserts that it had become established in equity. This is the weakest point in his argument. He can produce few cases; he is compelled to reason from inference. An occasional hint from the Year Books, and a brief quotation or two from contemporary writers, are all he has to offer. This, it must be admitted, is not very convincing.

<sup>1</sup> Essays, p. 213.

### CH. III] THE DOCTRINE OF CONSIDERATION 65

Mr. Salmond is not to be blamed for this defect, for he had no access to the materials whence proof might be drawn. But it is at this very point that our real inquiry begins. The burning question, which has been largely ignored, is this: What evidence is there that parol contracts were enforced in equity, and if they were enforced, upon what principle or principles did the chancellor act? To this inquiry the second part of the present essay is devoted.

## PART II

### CONTRACT IN EQUITY

#### CHAPTER I

#### INTRODUCTORY

EVERY one who is familiar with the records of the fifteenth century is aware of the activity of the court of chancery. Aside from matters of grace which were thought to be properly within its purview, the court was exercising a wide influence upon the development of the substantive law. Not even the freehold was sacred from its interference. A long series of protests in Parliament<sup>1</sup> bear testimony to the encroachment of the chancellor upon the sacred precincts of the common law, and as most of these complaints emanated from the Commons, they were, no doubt, the work of common law attorneys who resented the intrusion of another court.<sup>2</sup> Here and there in the Year Books appear references to the competition of chancery; Fairfax J., in a well-known remark,<sup>3</sup> urged pleaders to pay more attention to the action on the case, and thereby lessen the resort to the subpoena. In fact, there can be little doubt that the eagerness displayed by certain judges to extend Assumpsit from misfeasance to non-feasance was prompted by the strong desire to retain jurisdiction that was fast slipping away.<sup>4</sup> There is thus abundant extrinsic evidence of the interference of the chancellor within what was regarded as the domain of the common law.

<sup>1</sup> These protests begin in the reign of Richard II and continue at intervals for more than a century.

<sup>2</sup> Kerly, *History of Equity*, 37 ff.

<sup>3</sup> 'Et issint jeo vous conselle que estes pleades et donque les Sub paena ne seront my cy soventment use come il est ore, si nous attendoms tiels actions sur les cases et maintenoms le Jurisdiction de ce court et d'autres courts.' Y. B. 21 Ed. IV. 22. 6.

<sup>4</sup> See 1 Spence 243, note b.

Hitherto, however, the precise nature of the chancellor's jurisdiction in contract has been largely a matter of conjecture. Investigators have quoted *Doctor and Student*, passages from the *Diversity of Courts*, and other interesting texts. These do not carry us very far. The language of the text writers is not always free from ambiguity; furthermore, our inquiry is not satisfactorily settled by the opinions of even the most trustworthy contemporaries as to what could be done in chancery. The actual pleadings are available, and before we can attempt to say anything definite, it is necessary to examine them.

Unfortunately, only a small fraction of this material exists in published form. In the two volumes of the Proceedings in Chancery a number of selected petitions are printed, and in the tenth volume<sup>1</sup> of the Selden Society publications Mr. Baildon has presented an interesting collection of cases. We find among these a few cases relating to contract, but they scarcely do more than rouse our curiosity. Moreover, it is questionable whether the material so far published adequately represents the great bulk of the petitions that are preserved. In consequence it seems desirable to go back to the original records.

The material which is the basis of this part of the investigation is found in the collection of petitions in the Public Record Office catalogued under the title, 'Early Chancery Proceedings'. This collection includes all the petitions addressed to the chancellors from Richard II to the early years of Henry VIII, so far as they have been preserved. The petitions are divided into 377 bundles containing an estimated total of 300,000 cases. Obviously it is impossible for one person to make an adequate examination of so vast a number of cases. All that one can hope to do is to make as representative a selection as possible.

Before describing the method followed in making such a selection, a few words may be said with regard to the petitions as a whole. Even a cursory examination shows

<sup>1</sup> This volume contains all the petitions in Bundle III, and a few others selected from miscellaneous bundles.

that the province of chancery was not definitely settled in the fifteenth century. Theoretically, appeal is to be made to the chancellor only where there is no remedy at law, but this allowed a very wide latitude to the chancellor's discretion, and in fact, if he chose to assume jurisdiction in a particular case, there was no means of preventing the use of the subpoena. Equity might enjoin a plaintiff from prosecuting an action at law, but the King's Bench or Common Pleas had no process to restrain a petitioner from bringing suit in chancery. We do not mean to say that relief was given in every case in which it was sought, but it is apparent that there was a general belief that in equity wrongs which escaped the common law courts would be remedied. '*Nullus recedat a Curia Cancellariae sine remedio*',<sup>1</sup> exclaimed a chancellor when a legal technicality was urged against the subpoena in a particular case. This maxim cannot be applied literally; it is, however, very interesting as indicating the attitude of chancery, an attitude which helps to explain the presence of so great a variety of cases.

No doubt in many of the early cases the petitions were experimental; at all events some of the alleged causes of action are so fantastic that they read strangely to modern eyes. The chancellor is asked, for example, to restrain the defendant from using 'the craftys of enchantement, wycheecraft and sorcerye', whereby the petitioner 'brake his legge and [his] foul was hurte'. We are scarcely surprised to learn that under such circumstances 'the comyn lawe may nouzt helpe'.<sup>2</sup> Another petitioner alleges that he has been injured by the evil practices of the defendant who 'par divers artz erroneous et countre la foy Catholic, cestassavoir socery, . . . ad sustretez la ewe de une certeine ponde de mesme cesty Suppliaunt deinz la close avauntedit en graunde parde et anientisment des bestez esteauntz pastez deinz mesme le close'. After failing in an action of trespass this disappointed litigant concluded that the loss of water by sorcery was 'une mater de conscience', and so he prayed for a subpoena.<sup>3</sup> Again, injury has been

<sup>1</sup> Y. B. 4 H. VII. 4. 8.

<sup>2</sup> 1 Cal. Ch. xxiv.

<sup>3</sup> XII. 168. For another petition seeking relief for damage caused by alleged sorcery, see XII. 210.

done to the 'Kinges foul called an Estrich', and a petitioner demands compensation.<sup>1</sup> One is tempted to dally longer over these delightfully ingenuous petitions, but they do not concern us here, except in so far as they indicate the diversity of causes heard in chancery.

The cases involving contract represent only a small proportion of the Chancery Proceedings. Bills which sound in tort are very common,<sup>2</sup> and together with those in which the cause of action is purely equitable (e.g. breaches of trust, &c.), they make up the majority of the petitions. There remains a residuum of cases in contract, and it is these which require our attention.

Naturally it is impossible to consider even this restricted class of cases in its entirety. Two principles of elimination were therefore adopted. First, I have confined myself very largely to the earlier bundles. What we chiefly wish to know about equity is how far it enforced contracts before the common law obtained a rival remedy in Assumpsit. Consequently the fifteenth century is the most important period, and we look with particular interest at the first half of it. None of the petitions which are cited in the remainder of this study are of later date than 1485, and most of them are much earlier. In other words, they all antedate the appearance of Assumpsit by at least twenty years. Secondly, such cases in contract as present purely equitable doctrines have not been considered. Within the two limitations mentioned, I have attempted to present a selection of cases which is characteristic of the whole body.<sup>3</sup>

<sup>1</sup> XI. 227.

<sup>2</sup> e.g. *Briddicote v. Forster*, 1 Cal. Ch. iv : LXVIII. 44 (10 S. S. 123); a bill against a surgeon for damage due to misfeasance. The petitioner says he cannot bring an action at law 'par cause de graunde mayntenance encountre le dit suppliant en ycest partie'.

<sup>3</sup> The specific bundles which I have examined are as follows : Bundles IV to X were examined with great care; in fact I looked at every case. After that I relied more largely upon the catalogue, looking only at such cases as seemed to involve contract. In this manner Bundles XI to XX were examined. Bundles XXI to XXVI were omitted; but I examined Bundles XXVII to XXXI, XXVIII to XXXIX, XLI, XLIV, LIX, LXVIII to LXXI. By studying the catalogue with care I was able to select petitions from different periods of the fifteenth century, and in consequence

The word 'cases' has been used in referring to this material, but such a description is scarcely appropriate. For the most part we have only the complainant's petition; the answer and other pleadings do not often appear. Probably this is due to the practice, which prevailed for a considerable time, of not recording the defendant's answer in writing. When the defendant appeared, he was examined *viva voce* by the chancellor,<sup>1</sup> but no record was made of it. In the later cases we find defendants putting in answers in writing and sometimes the pleadings continued, and there was a replication from the complainant and a rejoinder by the defendant.<sup>2</sup> Largely, however, we have to be content with hearing only one side of a case.

While this dearth of answers is unfortunate, the petitions suffer from a defect even more lamentable. Very few of them are endorsed with judgement. Mr. Baildon<sup>3</sup> estimates the percentage of final decrees recorded to be about 9½ per cent. of the total number of cases, an estimate which I am inclined to think too high if one is to judge the Chancery Proceedings as a whole. This, however, is not vital. The question of the authority of these petitions is, on the other hand, very important. If a petition is unendorsed we cannot determine whether or no relief was granted in that particular case. Are we therefore precluded from drawing an inference at all? I do not think so. A petition endorsed with judgement is assuredly the best evidence, and luckily we are able to present endorsed petitions which cover a variety of cases. But we can go beyond this. Where there are numerous petitions based upon the same or a similar state of facts, it is submitted that it may be reasonably inferred that relief sought was granted. Such evidence is not final, but it has a high persuasive value. While we do lament the absence of indorse-

they represent the attitude of the different chancellors throughout the greater part of the century.

<sup>1</sup> See 10 S. S. xxvii.

<sup>2</sup> e.g. XIX. 59, 56, *Cases*, pp. 199, 202.

<sup>3</sup> 10 S. S. xxix, note 1. This estimate does not, of course, pretend to apply to all the Chancery Proceedings. It was based upon the selected petitions in the Cal. Ch. and 10 S. S.

ments, we must take the material as it exists and make the most of it.

So much for the material upon which our study is based. We may now turn to the cases in contract. We use the term contract in its largest sense so as to include obligations under seal as well as parol agreements. While our main interest lies in parol contract, the attitude of the chancellor toward sealed writings is not without interest. Moreover, it throws a reflex light upon agreement itself. Attempts were made to discharge sealed instruments by verbal agreements. Deeds were sometimes conditioned or otherwise modified by parol. Such transactions raise interesting questions which could not be answered if we were to limit ourselves to parol agreements alone. The principles upon which the chancellors acted can best be elucidated from as wide a consideration as possible of the treatment of contract in equity.

One preliminary question may be briefly noticed before we outline the method to be followed in this inquiry. Why did petitioners desire to bring a case before the chancellor? Did equity afford any advantages not possessed by the common law? The following points may be noted:

1. In concluding our survey of the common law we had occasion to point out certain agreements which did not support an action. The total absence of a legal remedy drove many litigants into equity.

2. Even where a remedy was provided at law it might fail in a given case. The cause of such failure will concern us later. We may note here, however, that the common allegation, 'no remedy at law,' covered a multitude of infirmities in legal procedure. This was carried to such an extent that wager of law by the defendant was recognized as a valid ground for appealing to equity. In an interesting case in 1432, a petitioner prayed that he might have the assistance of the chancellor in recovering goods bailed. He could bring Detinue, but if he did so the defendant would acquit himself on oath. The chancellor took jurisdiction and ordered the defendant to return the goods.<sup>1</sup>

<sup>1</sup> XI. 427a, *Cases*, p. 187.

3. Chancery offered decided advantages of which litigants were always eager to avail themselves.

(a) Chancery process was speedy, and the trial itself was not subject to the delays which beset an action at law.

(b) Remedies were obtainable in equity which did not exist at law, e. g. specific performance of contract.

(c) The common law would never compel, and in some cases would not permit, parties to testify. In chancery the defendant could always be examined.

(d) It was possible to join several causes in the same suit in equity. We find a petitioner alleging a variety of claims against one defendant in the same bill,<sup>1</sup> and, if we may believe the writer who makes bold to unfold the practice of the High Court of Chancery, several plaintiffs 'for different and severall causes' might join in one bill against a defendant, while a single plaintiff might bring a bill against 'diverse Defendants for severall and different causes'.<sup>2</sup> We do not go so far as to say that equity took jurisdiction because a petitioner had several claims against a defendant; but, at any rate, if any one of them gave jurisdiction to the chancellor, the others might be included in the bill.

We may assume, therefore, that whenever possible a case was brought before the chancellor. What has been said so far is only by way of introduction. There remains now the vital part of our study which is concerned with the examination of contract in chancery in the fifteenth century. This falls into three parts:

I. The scope of equitable jurisdiction in contract.

II. Chancery process and procedure.

III. The theory of contract in chancery.

<sup>1</sup> e. g. IV. 94 (Relief against an obligation which was paid, joined with a claim against the defendant by a bill unsealed); VI. 211 (To secure an accounting for moneys received and to recover charters bailed); IX. 147 (To recover payment due on a sale of land and to stop suit on an obligation); XI. 4 (To recover goods and chattels, and to recover payment for land sold). Such cases are of frequent occurrence. Many more might be cited.

<sup>2</sup> Choyce Cases, 4.

## CHAPTER II

### THE SCOPE OF EQUITABLE JURISDICTION IN CONTRACT

THE purpose of this chapter is to show the extent of the jurisdiction of chancery in contract. As the scheme of classification of the petitions is not strictly analytical, I wish to say something by way of explanation. Equity is not an independent and self-sufficient system of law. It has built itself into and round another system, and if the common law should be swept away, equity would be left, so to speak, suspended in the air. We cannot, therefore, find a principle of classification within the chancery material itself. In consequence, one of two things might have been done. The petitions might have been divided according to the types of contract which they present; or we might have found our basis of division in the causes of the failure of remedy at common law. Neither of the methods has been followed exclusively; rather have we attempted to use both, and in consequence the scheme adopted is open to criticism.

Before saying anything in attempted justification we may outline the method followed. In Section I are collected some petitions of a miscellaneous character, which are brought in equity for some reason not concerned with the subject-matter of the case. These petitions have one element in common. They concern cases for which in theory the common law did provide a remedy. In Sections II to V the common law actions are clearly paralleled. Thus, in considering obligations under seal, and the recovery of debts in chancery, we follow closely the actions of Covenant and Debt. Again, in the petitions for recovery of specific chattels and the petitions brought against vendors of personalty, the parallel is with the action of Detinue. The remaining sections (VI-XII) are

concerned entirely with parol contract, and herein the petitions have been grouped according to the subject-matter of the agreement and the nature of the promise.

It will be obvious that these sections are not co-ordinate, nor are they mutually exclusive. The divisions cross each other, and there is a certain amount of unavoidable repetition. This is a grave defect. However, this method, whatever its logical deficiencies, has made possible what could not have been accomplished in any other way. It enables us to do three things:

1. To examine the various reasons assigned for bringing a petition in equity.
2. To contrast the treatment of similar types of cases at common law and in equity.
3. To classify the cases involving parol contract (for which there was no remedy at law), according to their subject-matter. Symmetry has been sacrificed for what seemed practical utility; I hope the cost is not too great.

#### SECTION I.—PETITIONS BROUGHT IN CHANCERY DESPITE THE EXISTENCE OF A REMEDY AT COMMON LAW IN THEORY

The Prior and Convent of Mountgrace and their predecessors had been seised time out of mind of a rent. The defendants (lessees) always paid the rent regularly, '... yitte nowe late by the space of two yeres the said . . . (defendants) . . . of ungodly disposition refuse to pay hit saying that your seid besechers shuld noo landes ne rentes have there but if they would come and dwell þeruppon and kepe hospitalitee'. In consequence the petitioners pray the assistance of the chancellor, '... consydering that your saide besechers be but poore symple menne and not enhabited in that contre neiþer havynge knowlege [nor] favor, nor being of power to sewe þe law agaynes payme'.<sup>1</sup> The case is plainly one of Debt, yet the petition is brought before the chancellor because of the weakness and lack of power of the petitioners.

This appeal is typical of many others. The disorganized

<sup>1</sup> XIX. 92.

state of the country induced by the struggle between the Houses of Lancaster and York, the damage wrought by robbers and freebooters<sup>1</sup>—in brief, the failure of the ordinary courts to carry out justice because of extraordinary conditions—all these stand forth vividly in the chancery petitions. There is a remedy at law theoretically, but it fails because of the poverty of the petitioner, or the power and influence of the defendant. Juries were packed and bribed, officers of courts were overawed and induced not to serve writs; in fact, there were times when the judicial system of the country was reduced to chaos. Under such conditions parties took their cases to chancery, alleging in bitter truth that there was no remedy at law. Nor is this all. Common law process was slow, and there were many inevitable delays. Merchants<sup>2</sup> who were only temporarily in England, or soldiers in service abroad, could not always await the beginning of term, nor risk the perils of continued essoins on the part of the defendant.<sup>3</sup> The remedy, if it be remedy at all, must be speedy. So multifarious are the grounds of appeal that it becomes difficult to classify them. We shall attempt, however, to bring them under certain heads. It should be remembered that in all the following cases there is supposedly an adequate remedy at law. The chancellor is not providing a new remedy, nor enlarging the scope of the substantive law. For an extrinsic reason he takes jurisdiction. This may be due to:

### 1. *The Parties.*

(1) The king or persons who represented him might always bring their case before the chancellor. It was not necessary to allege that there was no remedy at law; the king might choose his own court and appear indifferently in the Common Pleas or King's Bench, or before the chancellor.<sup>4</sup> But the

<sup>1</sup> e. g. VII. 119.

<sup>2</sup> In III. 16 (10 S. S. 10) the petitioner asks for speedy relief in collecting a debt, because he cannot stay 'ad longam prosecutionem'. And see VII. 119 (Petitioner, a 'merchant estrange', cannot remain in England to suffer the delays of law).

<sup>3</sup> e. g. VI. 175 (Petitioner, being in the service of the Count of Salisbury, cannot stay in England to bring suit at law); VII. 25 (The delay of the common law is alleged as the reason for coming to equity).

<sup>4</sup> In Y. B. 39 H. VI. 26. 36 it is held that as the plaintiff was a grantee

personality of the king was extended in various ways. The defendant by refusing to pay a debt hinders the payment of the king's rent; again, he is stated to be a 'comond Wyth Drawer of the kynkes custume out of England'.<sup>1</sup> The petitioner appeals to chancery, alleging that the king is interested.<sup>2</sup>

(2) A clerk in chancery could not be sued against his will in the common law courts.<sup>3</sup> If suit were thus brought against him he might remove it to chancery by a supersedeas.<sup>4</sup> So, too, a clerk might begin suit before the chancellor, though he had a remedy at law.<sup>5</sup>

(3) An alien plaintiff could not sue in the ordinary courts. The chancellor (at all events in conjunction with the Council) took jurisdiction of cases where one or both parties were aliens.<sup>6</sup>

2. *The place in which the transaction occurred.*

(1) It seems, though there is little authority on the point, that a petition could be brought in equity where the agreement on which it was founded was made within the chancellor's jurisdiction, namely, within the royal palace of Westminster.<sup>7</sup>

(2) Contracts abroad: The common law did not take jurisdiction of contracts made out of England.<sup>8</sup> Thus, where the petitioners seek to recover money lent in France, they say,

of the king, he might bring an action at law or sue in equity. This is stated to be a privilege of the king.

<sup>1</sup> XV. 237.

<sup>2</sup> For a collection of cases where the ground of appeal is that the pleas were supposed to concern the king, see 10 S. S. xxiii-iv.

<sup>3</sup> Except for felony, or if a freehold were involved. Choyce Cases, 38.

<sup>4</sup> 'Par cause que le dit John Owgham est une del Chauncerie, il avoit une supersedeas hors del Chauncerie solonc le privelege de mesme le lieu.' IV. 76, cf. Y. B. 3 H. VI. 30. 15. In an action of Debt counsel for the defendant 'vient et mist avant un Supersedeas rehersant come le privelege de le Chancery est que nul q'est officer ou minister de le Chancery ne soit my emplede hors de le dit Place de nul ple que sera move, s'il ne soit de pleint de terre ou de treason ou de felony, encontre sa volonte; et pria que le Court surcesse'. The supersedeas was allowed. See also Y. B. 37 H. VI. 30. 15, and Choyce Cases, 78.

<sup>5</sup> VI. 299, Cases, p. 177 (An ordinary case of Debt).

<sup>6</sup> 10 S. S. xlii; III. 4 (S. S. 3); III. 16 (10 S. S. 10); VII. 71 (Appeal on another ground); VII. 196 (*semble*).

<sup>7</sup> III. 3 (10 S. S. 2).

<sup>8</sup> e.g. Hertpol in Y. B. 32-3 Ed. I [R. S.] 377: 'jugement si de receyte ou de contracte fet en Hyrland deyt ceysns respondre'.

'... a cause que les ditz obligations furent fait a Caley et non pas en Engleterre, ils ne sachent en quel Countee d'engleterre, ils purront prendre leur accion pur trier la dite some'.<sup>1</sup> The difficulty, which was procedural (it being impossible to lay the venue in an English county), was later overcome by a fiction,<sup>2</sup> but in the fifteenth century many obstinate debtors availed themselves of the technical defence at law. For example, the plaintiff, being in Rome, there lent the defendant £4, upon promise of 'hasty payment' as soon as they returned to England; but after their return '... the said Abbot (defendant) knowing utterly that your said besecher can have no remedy agenst hym by the lawes of this land for as muche as ... the said money was lent by yonde the see and not wythe in the Realme ...', refused to pay.<sup>3</sup> Appeals on this ground are frequent.<sup>4</sup> Many of these petitions relate to obligations<sup>5</sup> made abroad, but there are others which concern more general transactions.<sup>6</sup> In two cases appeal is made to equity to introduce evidence of an agreement made out of England by way of defence to an action at law.<sup>7</sup>

<sup>1</sup> LXIX. 131.

<sup>2</sup> The fiction consisted in the use of a *videlicet*. See Tidd's Practice (8th ed.), 430.

<sup>3</sup> LIX. 38.

<sup>4</sup> Thus in XXIX. 317, the petitioner says, '... for asmuche as the seide bargeyn was made in the parties of beyond the see and not Within this Realme, your seide bisecher hath no remedie by the comone lawe of this lande, but onely by supplication afore your good and gracious lordship in the Court of Chauncery'.

<sup>5</sup> Obligation made at Calais: VI. 71; VII. 71; VII. 226. In VI. 161 the petitioner asks the chancellor to give him relief against an action brought at common law on an obligation made in Rouen; he alleges two reasons, first that the obligation is in fact satisfied, secondly 'que la dite obligacon feust fait es parties ou la comune ley D'angletere ne purra avoir iurisdiccon'.

<sup>6</sup> Account: 2 Cal. Ch. lxx; Debt, XII. 51 (Petitioner says, '... for the said duytees growing by certeyn contracte made by yonde the see ... [he] ... hath no remedy ... by the Commune law of this land ...'); Petition against a factour in regard to transaction in Prussia: XVI. 427; Suit for expenses incurred abroad at the defendant's request: XIX. 295 ('... for as moche as the saide expenses and costs were done oute of this lande your seide besecher faileth remedy atte comune law'); Assignment of goods made abroad: LIX. 124.

<sup>7</sup> Agreement made in Spain: XLIV. 253; Transaction at Calais: LIX. 294 (Petitioner says it is not pleadable in bar at law 'by cause it is so not matter triable wyth in this lond').

### 3. *Inequality of Parties.*

The weakness of the petitioner on the one hand, or the strength and power of the defendant on the other, brought many cases before the chancellor.<sup>1</sup> 'Your heart and hand must be ready for the relief of the poor', exclaimed Lord Chancellor Hutton in an address to the sergeants;<sup>2</sup> and in a tract relating to the office of the chancellor, the court is thus described: 'It is the refuge of the poor and the afflicted; it is the altar and sanctuary for such as against the might of rich men, and the countenance of great men cannot maintain the goodness of their cause.'<sup>3</sup> That these were more than a set of good adages is witnessed by the petitions themselves. We may group them in two divisions:

#### (1) Poverty of the petitioner.

These appeals are often framed in piteous terms. 'Poor fadyrless children' bewail the fact that they cannot afford the expense of a common law action;<sup>4</sup> a convent has ejected the petitioner from his lease, and he is 'by the meane of the same puttyng oute so enpoverisshed where through he is noun-sufficient in goodes to mayntene hys accion at the comune lawe . . .'.<sup>5</sup> Common law writs were expensive luxuries, and if the petitioner was reduced to poverty, he thereby lost his remedy. The denial of justice was substantial, if not theoretical. Hence came the appeal to equity.<sup>6</sup>

<sup>1</sup> 'Inequality of persons is cause to hold suit here (i. e. in chancery), although otherwise the matter be determinable properly at the common law.' *Green v. Cope*, Hill. 9<sup>o</sup> Jac., Choyce Cases, 47.

<sup>2</sup> Sanders, ii, p. 1035 (cited 1 Spence, 387).

<sup>3</sup> Lord Ellesmere: Office of Lord Chancellor, 21 (Holdsworth, i. 206, n. 6). It may be that this tract is erroneously ascribed to Lord Ellesmere. See Pollock, Expansion of the Common Law, 70.

<sup>4</sup> XIX. 20.

<sup>5</sup> XXIX. 321.

<sup>6</sup> In the following cases the petitioners allege poverty as the ground of appeal to chancery: 1 Cal. Ch. xiii; 1 Cal. Ch. xxx; 2 Cal. Ch. xii; III. 114 (10 S. S. 40); III. 93 (10 S. S. 47); III. 91 (10 S. S. 76); IX. 342; X. 308 (Petitioner 'ys so pouere that he hath not where of to sewe þe comone lawe'); XI. 84; XI. 213; XVI. 438 (10 S. S. 134); XIX. 480 ('for asmoche as your said besecher hath lost his goodis be yonde þe see . . . (he) . . . is nat of power to sue þe comone lawe . . .'). In XI. 358, the defendant is described as 'havyngre grete habundance of Richesse', whereas the petitioner is 'but a pore man nouzt yn power to sue the comone lawe agenst hym'.

## (2) Maintenance and power of the defendant.

The system of common law courts, depending as it did upon a jury and many petty officials, was one of which a rich and unscrupulous defendant might readily take advantage. The case was tried in the particular county in which the transaction took place, and it was easily possible to corrupt the officers of the courts or to overawe a jury. Defendants made use of the influence of their family and friends<sup>1</sup> to procure decisions favourable to themselves and to obstruct justice. The petitions repeat this charge with a wearisome monotony. The defendant 'is riche and mayneteined by strength and your seid besecher hath sued many wryties atte comyn law and he canne get noun served'.<sup>2</sup> 'Howsoever the seid suppliant would sue against the said William Clopton at common law, he can never come to his purpose, because of the great maintenance of the said William in those parts.'<sup>3</sup> The petitioner attempted to bring Detinue, but such was the influence of the defendant that the sheriffs refused to serve the writs.<sup>4</sup> Sometimes the petitioner was himself threatened and oppressed so that he did not dare bring suit at law ;<sup>5</sup> 'nulle n'oise pursuer envers luy come le commune ley demande par cause de sa grante maintenance'.<sup>6</sup>

Bribery and corruption likewise were alleged against defendants. For example, the petitioner brought suit against one Albright Yanson de la Wyke before the bailiffs of Yarmouth, but the gentleman of that engaging name succeeded in greasing the palms of the officers of the Court, for our artless pleader remarked that 'because that the sayd bailyffs lofe and cherisshes the sayd Albright, they wil not gyfe iugement accordyng to the truth of the matter as faith and conscience will'. The petitioner prayed that the bailiffs might be brought into

<sup>1</sup> '... les ditz Johan et Thomas sont si grandz de consanguineteez, alliancez et amistez en leur pays, qe le dit suppliant n'auera mye droit deuers eux par ascun poursuite a la commune ley...' III. 82 (10 S. S. 48). In III. 41 (10 S. S. 34) it is alleged that the defendant is 'si riche et si forte d'amys en pays la ou il est demourant' that the petitioner can never recover against him.

<sup>2</sup> XII. 205.

<sup>3</sup> VI. 156 (10 S. S. 111).

<sup>4</sup> XII. 56.

<sup>5</sup> See III. 58 (10 S. S. 31); III. 60 (10 S. S. 33); III. 65 (10 S. S. 26).

<sup>6</sup> III. 22 (10 S. S. 11). To the same effect, XI. 84.

chancery by subpoena, ' . . . to be examyned of these premisses so that be your discrecon ryght may be done to all parties, for the luf of god and in the way of charite '.<sup>1</sup>

Space forbids the inclusion of further excerpts from these petitions. They bear eloquent testimony to the difficulties which beset an action at law in the fifteenth century. We cannot state the relative proportion of the chancery petitions which were based on the misconduct of the defendant, but they are sufficiently numerous to form a large and distinct class.<sup>2</sup> We feel reasonably sure that the chancellor did intervene. The number of appeals leads one to suspect this; and furthermore, we have one petition endorsed with judgement. An action of Debt was brought on an obligation against the petitioner. The defendant caused ' a panell to be returned of suche persons of his affynyte which wold here no evydenche for the part of yo<sup>r</sup> seid Orato<sup>r</sup> . . . ' Appeal was made to the chancellor, who granted an injunction, restraining the defendant from prosecuting his action at law until the case could be heard in equity.<sup>3</sup>

#### 4. *Failure of common law process.*

##### (1) Inability to serve a writ on the defendant.

A defendant by constantly moving about could hold common law process at bay. There appear to have been many of these elusive persons, who avoided their just debts by keeping away from the place in which they were contracted. One petition sets this forth in so naïve a manner as to deserve quotation: Adam, Prior of Tutbury, borrowed £160 of the

<sup>1</sup> XVI. 573.

<sup>2</sup> The following petitions, in addition to those already cited, allege the power and maintenance of the defendant as the reason for appeal to the chancellor: V. 65 (Petitioner brought Replevin, but the action failed ' par cause de la grande puissance . . . et subtile confederance ' of the defendants); VI. 92 (in nature of Detinue); VI. 156 (10 S. S. 111); VI. 140 (Detinue); VI. 165 (Detinue); VII. 219 (another reason as well alleged); X. 181 (Debt; petitioner is unable to have any writ served against the defendant because of the ' favour that he hath of officers in that countre . . . '); XI. 84 (Detinue on a bailment; the defendant ' hath so grete power and mayntenance in the said contree that the saide pouere Wydowe (petitioner) is of non power to pursue the comone lawe agenst hym . . . '); XXIX. 410 (Relief against an action of Debt which is like to go against the petitioner because of the defendant's maintenance).

<sup>3</sup> LIX. 242 (LIX. 243 is the defendant's answer).

petitioners and bound himself in four obligations, but on the day of payment he refused to satisfy them. Then, say the petitioners, 'le dit Priour est home aliene neez et engendrez et de lieger conscience, issint que si les ditz suppliantz voillent conceyver envers le dit Priour ascun accion a la comune ley, il est divers foitz alauntz outre la meer et diverse foitz ad protections et en diverses foitz le dit Priour est expectant et demourant en divers lieux priveleges issint que les ditz suppliauntz ne purront mye executer la comune ley envers luy a graund damage et arrerisement des ditz suppliantz s'ils n'ount vostre tres gracious eide et socour en celle partie'.<sup>1</sup>

Despite the patriotic avowal of the complainants in the petition already instanced, we find that debtors of domestic nurture developed a capacity of movement not inferior to that of the 'home aliene neez et engendrez'. Some defendants refused to appear at all;<sup>2</sup> others, who were never 'continuellement demourant en nul lieu',<sup>3</sup> moved rapidly from county to county or at the critical moment went abroad.<sup>4</sup> The subpoena was superior to the common law writ. It was easier to serve; it was not limited by county boundaries; it could be obtained very speedily. It was not remarkable, therefore, that despairing creditors took refuge in equity.

## (2) Privileged Places.

There were numerous 'privileged places' in England in which a common law writ would not run. The defendant, says one petition, has departed to 'place privileged and seyntwary where your besechers can no remedy have by þe comune lawe . . .'.<sup>5</sup> Into these numerous special jurisdictions

<sup>1</sup> IX. 324.

<sup>2</sup> X. 76 (Petitioner attempted to bring Debt, but the defendant refused to appear, though he had acknowledged 'before notable persones' that the debt was due).

<sup>3</sup> LXVIII. 228.

<sup>4</sup> e. g. in III. 71 (10 S. S. 70) it is said that the defendant 'soi absent et voidit de lieu en autre issint q'ele nulle recouere ne remede vers luy ent puisse auoir par commun ley . . .'; VI. 168 (The defendant purposes to leave the jurisdiction and the petitioner 'de luy n'avera recovere solonc le processe de ley . . .').

<sup>5</sup> LIX. 106. In XI. 211 it said that the defendant 'hath enhabite hym in suche a place priveleged that the kynges write renneth not . . .'

or franchises it was possible to follow a defendant by subpoena. The council had power to issue writs into such jurisdictions,<sup>1</sup> and apparently this same power was exercised by the chancellor. At all events we find petitions addressed to the chancellor in which a subpoena is prayed against defendants, who are in Wales,<sup>2</sup> in the franchise of the Abbot of Whitby,<sup>3</sup> or in the county palatine of Chester.<sup>4</sup> Whether or no these cases were heard before the council we are not prepared to say; but at all events the petitioners did expect and claim relief in chancery.

In concluding we may advert to a question which is somewhat perplexing: Did the chancellor proceed upon principles of equity and conscience in deciding these cases? Mr. Spence,<sup>5</sup> relying upon the authority of Lord Ellesmere, asserts that in the exercise of his ordinary or common law jurisdiction the chancellor could not advert to matters of conscience. Now the so-called common law jurisdiction is usually considered to be that exercised over cases in which the Crown or a clerk in chancery was a party.<sup>6</sup> It may be, though of this I am not convinced, that in exercising this jurisdiction the chancellor followed the common law. There is practically no authority on the point, but I should like to call attention to the remark of the chancellor in a case in 1469.

A subpoena<sup>7</sup> was brought against three executors, of whom only one appeared. It was urged that he should be compelled to answer, but to this the chancellor was unwilling to agree; the three executors together represented the estate of the testator, and that the answer of one should bind the other two

<sup>1</sup> 1 Spence, 330.

<sup>2</sup> XI. 402.

<sup>3</sup> '... also for as much as the ... (defendants) ... dwellen within the Franchise of the Abbot of Whitby, ... (petitioner) ... may have no manner of writte for to be executed agenst thaym after the cours of the comune lawe of this land ...' XIX. 471.

<sup>4</sup> The petitioner brought Debt on a recognizance, but the defendant has betaken himself 'into count palyse in Chestourshire and in other places privileged with his goodus and catels and no lond bath at the comyn lawe so that the seid beseecher may not have execution of the seid summe ...' IX. 475.

<sup>5</sup> 1 Spence, 337.

<sup>6</sup> This is only a part of the common law jurisdiction. See Coke, 4 Inst. 79, and 1 Spence, 336.

<sup>7</sup> The nature of the case does not appear from the report.

would, he said, be *contrary to conscience*. In the course of the discussion, Pigot, representing the complainant, instanced what he thought was a pertinent analogy. If an attachment, so he argued, were sued against several clerks in chancery as executors, and one appeared, he would be forced to answer. To this the chancellor replied : ' Cel attachment doit ensuer le nature d'action al comen ley, et issint n'est cel Subpoena,' &c., ' en l'attachment jay ij powers, un come judge temporal, et autre come Judge de conscience, car s'il appiert a moy sur le matter monstre en le attachment que conscience est en le matter, jeo adjudgera sur ceo come judge de conscience,' &c.<sup>1</sup>

In the hypothetical case the clerk would appear as a defendant and not as plaintiff ; and we do not know the precise ground upon which jurisdiction would be assumed. However, the chancellor declares that on an attachment,<sup>2</sup> which partakes of the nature of an action at common law, he may decide on principles of conscience. This is an interesting and important declaration. It seems to throw doubt upon Lord Ellesmere's statement, at least so far as the court of chancery in the fifteenth century is concerned.

However, even if it be granted that in cases in which clerks in chancery and the Crown were concerned equity followed the law, there still remains that large class in which the poverty of the complainant, the power of the defendant, &c., or the fact that the transaction took place abroad, brought the case before the chancellor. The petitions, one and all, demand relief in accordance with reason and conscience ; they are framed upon exactly the same lines as those upon which the chancellor granted relief not obtainable at common law. Are we to believe that reason and conscience were exhausted in conferring jurisdiction ? Must the chancellor admit all the technical defences available if the action had been brought at law ? Though matter of conscience arise, must it be ignored ? In the absence of any endorsed case it is difficult to tell. I venture, however, to suggest that the chancellor decided

<sup>1</sup> Y. B. 8 Ed. IV. 5. 1 (p. 6).

<sup>2</sup> An attachment was a writ issued against a defendant who, after service of the subpoena, did not appear at the time fixed. 1 Spence, 370.

these cases on his own principles wherever they conflicted with a rule of law. The court which gave relief in the face of a technical legal defence, such as wager of law, would not be likely to withhold such relief as accorded with reason and conscience, no matter upon what specific ground it assumed jurisdiction. Any other conclusion seems to run counter to the principles and practice of the chancellor.

## SECTION II. PETITIONS RELATING TO OBLIGATIONS UNDER SEAL

In examining the doctrines of chancery with regard to obligations under seal we shall not consider defences which are purely equitable, as, for example, fraud. Without doubt, from early times equity granted relief against sealed writings procured by duress<sup>1</sup> or induced by fraud<sup>2</sup>; there is much talk of false obligations and feigned acquittances. In a case which may be noticed as typical, a petitioner besought the aid of the chancellor, because the obligor had 'feyned acquitaunce' to bar a just debt; he prayed that the defendant (obligor) might be brought into chancery 'for to be examined in his matiere and here for to answer in the same and to receive what the court shall award'.<sup>3</sup> But, though the multiplicity of these appeals tempts one to examine them further, our real interest lies in those cases in which equity definitely met the law in its own field and supplemented or altered the stricter legal doctrines from principles of reason and conscience.

The specific topics to be considered are as follows:

- I. Cases in which the obligation is satisfied but the obligor has no acquittance.
- II. Simple (i. e. unconditional) obligations which are conditioned by parol.

<sup>1</sup> Ancient Petitions, No. 14806 (10 S.S. 127); 1 Cal. Ch. xlv; IV. 6; V. 118. Payment procured by duress was good ground for the chancellor's intervention. Thus where one by duress of imprisonment constrained another to pay a debt already satisfied, a confident appeal was made to equity to recover the second payment 'come conscience et bon foy requiert'. XI. 23.

<sup>2</sup> III. 3 (10 S.S. 2); V. 64; VI. 117; XI. 257.

<sup>3</sup> XI. 257.

III. Obligations executed for a specific purpose which has been accomplished.

IV. Variation of an obligation by parol.

V. Inquiry into the consideration of sealed instruments.

I. *Obligation is satisfied but still retained by the obligee, and obligor has no acquittance.*

'There is a general maxim in the law of England that in an action of Debt sued upon an obligation the defendant shall not plead that he oweth not the money, ne can in no wise discharge himself in that action, but he have an acquittance or some other writing sufficient in the law, or some other thing like, witnessing that he hath paid the money; that is ordained by the law to avoid a great inconvenience . . . that every man by a nude parol and by a bare averment should avoid an obligation. . . . And yet . . . [the law] . . . intendeth not, nor commandeth not, that the money of right ought to be paid again, but setteth a general rule, which is good and necessary to all the people, and that every man may well keep, without it happen through his own default. And if such default happen in any person whereby he is without remedy at the common law, yet he may be holpen by a subpoena . . .'<sup>1</sup> So speaks the Student in the famous dialogue. There is abundant external evidence that many suitors were appealing to the chancellor to be 'holpen by subpoena'; for the frequent recourse to the subpoena excited the envy and indignation of the defenders of the common law. An irate serjeant complains bitterly of the interference of the chancellor, who, he says, 'regarding no law but trusting to his own writ (*sic*) and wisdom, giveth judgment as it pleaseth himself and thinketh that his judgment, being in such authority, is far better and more reasonable than judgments that be given by the king's justices according to the common law of the realm'.<sup>2</sup>

The chancery pleadings afford ample proof that the rigid common law rules regarding sealed instruments were counter-

<sup>1</sup> Doctor and Student, i. 12.

<sup>2</sup> A Replication of a Serjeant at the Laws of England to . . . certain points in the Dialogue. Doctor and Student (ed. Muchall), 347.

acted by the chancellor's intervention. So innumerable are the appeals that it is impossible to take note of them all. They appear in the earliest records preserved, and the stream continues unabated to the end of the Early Chancery Proceedings. The chancellor was giving ear to the unwary, the simple people, the 'fatui',<sup>1</sup> who through ignorance or carelessness, or because they reposed confidence in the honour of the obligee, paid their debts but took no acquittance. 'He so of his innocencye and for such confidence as he had to the said Henry (obligee and defendant) left his obligation in his hand',<sup>2</sup> exclaims one complainant who repented him of his folly, after making payment. The obligee in this case had promised to deliver the obligation, but time passed, his memory grew dim, and he so far forgot himself as to bring an action of Debt in the Mayor's court in Bristol. The complainant was in dire distress; he knew he would be compelled to pay again; he felt it was against all law and conscience, nevertheless, as he related in his petition, he knew he was helpless at law: 'your said pore besecher can not make any barre in the lawe . . . for that it is his dede which shall be demed his foly . . .'<sup>3</sup> He asked, therefore, that the defendant (the obligee) be brought before the chancellor by subpoena, and that a writ of Corpus cum causa issue to the 'Mayor and Bailiffs' of Bristol. Thereby he might accomplish two things: he could stop the action at law, and obtain an examination of the defendant under oath. Unfortunately this petition is not endorsed; we cannot say<sup>4</sup> definitely that the relief sought was granted, but so numerous and repeated are these appeals in exactly similar circumstances that the presumption is very strong in the complainant's favour.<sup>4</sup> Furthermore, the chancellor definitely recognized such a situation, for he said: 'Si on paye un duty d'un obligation et n'ad escript, *ceo est bon conscience*; et

<sup>1</sup> 'Deus est procurator fatuorum.' Y. B. 8 Ed. IV. 4. 11.

<sup>2</sup> XXIX. 406.

<sup>3</sup> *Id.*

<sup>4</sup> VI. 339; VII. 155; VII. 218 (Complainant is arrested and in prison); IX. 94 (1441); IX. 190 (1442); IX. 214; IX. 215; X. 44; X. 168; X. 185; XI. 242 (1431); XI. 244; XI. 368; XI. 370; XI. 379; XV. 185; XVI. 263; XIX. 116; XIX. 439 *b*; XXIX. 308; XXIX. 440. These are merely a few selected cases out of many that might be cited.

uncore al comon ley nul barre.'<sup>1</sup> This simple state of facts is capable of almost infinite variation in detail without any fundamental change in the position of the parties.<sup>2</sup> Thus says one complainant :<sup>3</sup>

'Supplie tres humblement vostre povre orator, Robert Popyniay, que come il est grevouement sue et vexe par un William Newland, marchant d'everwyke a cause d'un simple obligacion fait a dit William par le dit suppliant . . . nient obstant que le dit William est pleynement content et paie . . . sicome devant vous par examinacion sera loialment prove.'

Nor need the payment necessarily be made by the debtor ; it was just as successful if made by some one else in his behalf.<sup>4</sup>

Payment made to a testator was a good defence against an action brought by his executors on an obligation, although the payment could not be proved by specialty.<sup>5</sup> In this connexion we may note an interesting and important case which throws much light on the attitude of the chancellor toward obligations which were in fact satisfied by payment :

The complainant was bound in an obligation of 10 marks to one Alice Reme. She died, leaving the defendants her executors, whom complainant 'truly paid and full contented of the dewete of the seid obligacion'. In full trust that the executors would discharge him, he left the obligation in their hands ; one executor died, and some years later the surviving executor, despite the payment made, 'not dredyng God nor th'offens of his own consciens,' brought suit in the Common Pleas on the obligation. The complainant, well knowing that

<sup>1</sup> Y. B. 7 H. VII. 10. 2.

<sup>2</sup> Appeal is made to the chancellor where payment was not according to the terms of the obligation, but was accepted by the obligee ; e. g. by furnishing pipes of wine where (apparently) the obligation was to pay money. XII. 16.

<sup>3</sup> IV. 94.

<sup>4</sup> The complainant was bound to the defendant by an obligation. He journeyed up to London to purchase goods, where unluckily the defendant (obligee) met him, caused him to be arrested, and would not release him, till complainant's wife paid the debt. Afterwards the complainant asked for an acquittance, which was refused, and after a brief interval the defendant began suit on the obligation at common law. The complainant seeks general relief. VII. 273.

<sup>5</sup> VI. 197 ; IX. 83 (1431) ; XI. 46 ; XIX. 219 ; XIX. 123 (The defence brought forward by an executor). Naturally these cases are not so numerous, but they are sufficient in number to establish the point.

payment would be no defence at common law, filed his petition in the chancery, alleging that it was 'contrary to all reason and gode conscience' that he should be compelled to pay twice, and yet he was 'without remedy be the Comen Lawe'. He asked for a subpoena requiring the executor to bring in the obligation to be cancelled, and that he might be enjoined from proceeding further at law.<sup>1</sup> The defendant in his answer<sup>2</sup> set up the usual technical defence with which most answers as a matter of practice began: that the matter alleged in the bill was not sufficient to put him to answer; then he proceeded to deny that payment had ever been made, which he held himself 'redy to averre as this court will award'. The petition is endorsed<sup>3</sup> with an order for an injunction to the defendant's attorney, restraining him from further prosecuting any action at law, until the matter could be heard and determined in the chancery. What the ultimate finding of fact was, we have no means of knowing; but there is small doubt that if the complainant could prove the truth of his bill, the chancellor would order the obligation to be cancelled.<sup>4</sup>

Sometimes in the prayer of the petitions complainants ask that the obligee be compelled to bring in his obligation to be cancelled; more often the prayer is general, the complainant trusting to the chancellor's discretion. The main thing was to get the creditor into the chancery, and have him examined upon oath. A careful and rigid examination, coupled with such evidence as the complainant himself might introduce, was bound to disclose the facts of the case. The petitioner usually offers to support his case by further testimony. 'Si come devant vous par examinacion sera loialment prove,'<sup>5</sup> 'Si come par proves suffisauntz,'<sup>6</sup> are phrases in constant use. One man alleges payment before 'several notable persons';<sup>7</sup> another is ready to testify himself and bring in his friends, but he is particularly eager to have the defendant examined, and prays that after such examination right may be done him as reason and conscience require.<sup>8</sup>

<sup>1</sup> LIX. 227, *Cases*, p. 231.

<sup>2</sup> LIX. 228, *Cases*, p. 232.

<sup>3</sup> LIX. 227, *Cases*, p. 231.

<sup>4</sup> Cf. LIX. 285, *Cases*, p. 232; XXIX. 13, *Cases*, p. 214; where the chancellor, being satisfied that the obligation should not be enforced, ordered it to be cancelled.

<sup>5</sup> VI. 339.

<sup>6</sup> IV. 94.

<sup>7</sup> XIX. 116.

<sup>8</sup> '... et sur ycell examinacion de feare droit en cest partie a dit sup-

'Reason and conscience' is a thing of great flexibility; indeed, in this rough and ready intervention of the chancellor there is observable a desire to isolate each case and decide it on its merits. It was against reason and conscience that a debtor should have to pay the same debt twice;<sup>1</sup> and on such ground the chancellor intervened. But this process of reasoning applies equally well where a debt has been *part* paid as where it has been paid in full; and it is not surprising to find that suitors appealed to the chancellor in such situations. In an example, selected as typical, the complainant was bound by obligation in 45*s.*, of which sum he had paid 34*s.* 4*d.*, but had no acquittance therefor. The obligee brought an action of Debt for the whole sum of the obligation, and, being without remedy at law, the petitioner appealed to the chancellor and asked for a Certiorari.<sup>2</sup> So, too, a debtor who has lost his acquittance,<sup>3</sup> a surety who is being sued on an obligation, when the principal debtor has satisfied the debt,<sup>4</sup> one who had an acquittance, but delayed so long in introducing it into evidence that it cannot be received,<sup>5</sup>—all these appeal with confidence to the chancellor. A little transaction which often created difficulties for the guileless debtor was responsible for appeals to equity. It seems to have been not uncommon that a debtor, for 'further security', should bind himself in double the amount of the actual debt; he might pay the debt, and still the creditor, armed with his sealed writing, could collect the full sum named in the deed; for the common law received such evidence as conclusive. The debtor's only resource was in the subpoena.<sup>6</sup> It would be rash to assert that

pliant come bon foy et conscience demandent, pur dieu et en overe de charite . . . ' VII. 33.

<sup>1</sup> Thus, exclaims one petitioner: ' . . . For oon duetee, withoute youre good grace, your forsaide besecher is leke to make ij<sup>o</sup> paiementz which were gretly agenst conscience.' IX. 459.

<sup>2</sup> X. 220, and see IX. 133 (1439); X. 175; XI. 46.

<sup>3</sup> VII. 92.

<sup>4</sup> X. 94 (Original debtor had an acquittance but has gone 'beyond the sea', taking the acquittance with him); X. 128; XIX. 257.

<sup>5</sup> IX. 459; in which complainant says that 'processe of the same accion (i. e. action of Debt on the obligation) is so ferre forthe that for defeaute that the forseide acquytauncez were not shewid nee leyd in due tyme that by the comone lawe nowe they mowe not be resseved'.

<sup>6</sup> VI. 6; VI. 160 (An obligation for £10, which had been paid, was retained as security for a further loan of 50 shillings); VII. 33; XV. 236

in all these cases relief was granted. I have stated them to show the nearly universal appeal made to equity, where an obligation or the intent thereof was partially or wholly satisfied, and yet the obligor was helpless. For in all these cases he would have sought a defence at common law in vain.

We turn now to other classes of cases. The obligation is simple, but a condition has been engrafted upon it. In the first case there is an express condition, but it is not available at law because it is parol; in the second there is no express condition, but one is implied from the circumstances, namely, that the obligation was executed for one specific purpose, and for that purpose alone.

II. *The obligation is simple (unconditional), but a condition is annexed by parol.*

Obviously the condition might assume various forms. It might require, for example, the doing of some act by the obligee, before the obligation should be effectual, that is, speaking roughly, the condition might be a condition precedent. Few examples of this species of condition are presented by our material.<sup>1</sup> Again, the obligation might have been conditioned for the performance of some act by the obligor. This represented a common situation in the fifteenth century. Bonds were given in surety to make an estate of lands, to secure the payment of rent, for the performance of some act;<sup>2</sup> and a prudent person would insist on having a clause of defeasance inserted in the obligation itself, or a separate defeasance bond. Judging from the numerous applications to equity, there were many persons who through ignorance or inattention neglected to take this precaution. They bound

(Obligation of 12 marks in security for debt of 6 marks. The debtor paid the 6 marks, but did not secure the obligation, and the obligee is bringing suit to recover 12 marks). And note V. 110 (A bond for £40 was made to secure a debt of £20. Before the debt was due the obligee brought suit on the bond; the obligor was cast into prison and compelled to pay £30. He appeals to the chancellor to recover the excess payment of £10 and also damages for his imprisonment).

<sup>1</sup> XV. 231; XIX. 249; LIX. 122 (The obligee is bringing suit without having performed the condition).

<sup>2</sup> e. g. to secure performance of a covenant, which was to say masses for the soul of a certain person: VII. 79; to resign a church to the obligee: IV. 90.

themselves in an unconditional obligation; the only condition lay in the oral agreement between the parties. Petitioners describe such a condition variously as 'rehered by words',<sup>1</sup> 'rehered by language',<sup>2</sup> 'saunz autre condition forsque par parole';<sup>3</sup> the condition, says another, 'n'est pas de recorde en l'enscript mes solement par bouche'.<sup>4</sup> The chancellor, not regarding a deed as of superior value, and being restricted by no stringent rules of evidence, was able to regard the transaction as a whole. There seems no question but that he admitted evidence of a parol condition<sup>5</sup> to controvert a sealed instrument, absolute on its face. Here is a typical case:<sup>6</sup>

Complainant took to farm the 'Frank chappel de Steresbrigge' of the defendants, paying 12 marks a year in rent. In security he bound himself to defendants in a simple obligation 'saunz autre condicion forsque par parole'. The parol condition was that he should pay the rent and bear all charges connected with the chapel. He avers performance of the condition; nevertheless the defendants (i. e. the obligees) 'ount grevosment sue le dit suppliant par force del obligacion avantdit, a graunde enpoveresment et perpetuel destruccion del dit suppliant s'il n'eit vostre gracieuse eide celle partie'. In relief complainant asks that writs may issue to bring defendants before the chancellor '... et sur ceo *eux examiner del faisaunce del obligacion* avant dit et d'ordeigner due remedie al dit suppliant solonque vostre tres sage discrecion ...'

I regret that I am unable to present any cases of this class which are endorsed, but the appeals are not infrequent,<sup>7</sup> and

<sup>1</sup> XIX. 249.

<sup>2</sup> XVI. 450.

<sup>3</sup> V. 143.

<sup>4</sup> VII. 79.

<sup>5</sup> Even where the obligor had not performed the condition, but stood ready to do so, he appealed to the chancellor. X. 259 (The obligation was bailed on condition, and the obligee's executor obtained it from the bailee by force).

<sup>6</sup> V. 143.

<sup>7</sup> Accord (with principal case) IV. 20; IV. 28; IV. 90; IV. 139; IX. 37; IX. 147; XV. 231; XVI. 408 (Relief against an action of Debt on a bond, contrary to a defeasance, of which complainant can make no use, as it is in the obligee's possession); XVI. 410; XIX. 279; LIX. 113; LIX. 122. These few cases scarcely give an adequate notion of the generality of the appeal to the chancellor. They are typical of many others. And see LIX. 285, *Cases*, p. 232, where an obligation executed for a specific purpose (i. e. condition implied) which had been accomplished was ordered to be cancelled. *A fortiori* the obligation should be cancelled if the condition was express.

the claim to relief is fully as valid as any that might come before the court. The relief sought is to have the defendant (obligee) before the chancellor, and compel him to show why the obligation should not be cancelled,<sup>1</sup> or 'wy he wol not deliver the seid obligacion as consciens and good feith requyreth'.<sup>2</sup> That powerful weapon of the chancery, the examination<sup>3</sup> of the defendant, could be used with deadly effect; and once the real position of the parties was ascertained, an order could be made which would accord with the demands of 'reason and conscience'.

### III. *Obligation executed for a specific purpose.*

In these cases there is no express condition; yet it is understood that the obligation absolute on its face is really executed conditionally, the condition being implied from the circumstances under which it is given. We cannot illustrate this better than from a case which is endorsed with judgement, so that there can be no doubt as to the decision:<sup>4</sup>

John Merfyn and William Clyfford agreed to enfeoff one Agnes in certain lands; and 'to the intent' that this feoffment should be made, bound themselves in a simple obligation to Geoffrey and William Hamond. The obligors died, and after their death the petitioner, as executrix of John Merfyn, caused an estate to be made to Agnes, 'according to the trewe intent of the making of the seid obligation'. Nevertheless the obligees not only refused to deliver up the obligation, but proceeded to bring suit upon it in the king's court 'callid the Comon place'. Petitioner appealed to the chancellor, asserting that this suit was against conscience, and praying for general relief. The obligees were brought in by subpoena, and examined under oath. Upon examination they admitted that the obligation was made for the intent specified in the petition, and that the intent was performed; whereupon the chancellor ordered that the obligation should be delivered to the petitioner to be cancelled.

The obligation did not disclose the purpose for which it was executed, but from an examination of the defendants the chancellor was able to gather the nature of the whole pro-

<sup>1</sup> IV. 90; IX. 37 (*semble*, obligation to be cancelled).

<sup>2</sup> XVI. 450.

<sup>3</sup> XVI. 410.

<sup>4</sup> LIX. 285, *Cases*, p. 232.

ceeding. The obligee had only a technical right to enforce his deed; isolating the case, and considering it on its individual merits, the chancellor concluded that it would be against reason and conscience as well as contrary to the intent of the obligation that it should stand good; hence the order. To turn to another case:<sup>1</sup>

Complainant agreed to enfeoff one Katherine in certain lands; in surety for the performance of the agreement, his uncle was bound, and complainant in turn bound himself to his uncle by a statute merchant to the intent ('al intent') that he should be saved harmless. The statute merchant bore no condition. Complainant enfeoffed Katherine; subsequently his uncle died, and the statute merchant came into the hands of an executor who is bringing suit against the complainant on the obligation, despite the fact that the purpose for which it was made has been accomplished; complainant asks for a writ against the executor, commanding him to appear before the chancellor with the obligation, and that the chancellor give 'remedie en ceste partie come la bon foy et conscience demandent'.

Appeal was made to the chancellor where a bond was given as a surety, though it bore no evidence of this on its face,<sup>2</sup> where the intent of the bond was to take seisin of land,<sup>3</sup> where a bond was bailed as security for a loan,<sup>4</sup> where an obligation was made to warrant peaceable possession under a lease.<sup>5</sup> The latter cases are not endorsed with judgement, but the principle upon which the chancellor acted in the first case cited applies equally well here.

#### IV. *Variation of a deed by a subsequent parol agreement.*

In the cases already considered, the whole agreement could only be ascertained by reading the obligation in connexion with the condition, express or implied. But there is a further

<sup>1</sup> IV. 69, *Cases*, p. 172.

<sup>2</sup> VI. 229.

<sup>3</sup> VIII. 12 (1450).

<sup>4</sup> VI. 122.

<sup>5</sup> XI. 90 (Complainant leased his church to X for one year, and in security that X should be in peaceable possession executed a simple obligation, which was delivered to X. X remained in possession for a year, . . . took the profits and died. Now the obligation has come into the hands of his executors, who threaten to sue complainant, though the purpose for which the obligation was made is accomplished. Complainant asks for general relief).

possible situation: the agreement may be complete and in writing under seal, and at a *later* time the parties may agree by parol to modify or abrogate the contract as expressed in the writing. It is not a question, then, of explaining a sealed instrument by further evidence: the deed did represent the intention of the parties at the time it was made: it is complete in itself. What has really happened is that another contract has been made; can it be introduced in evidence? To-day one who sought to use such evidence would doubtless find himself in difficulties with the 'parol evidence rule'; in the fifteenth century he would have been helpless in the king's court. In equity, however, rules of procedure and practice had not taken hard and fast shape; and it is possible that relief would be given in that quarter. With this in mind, let us examine three cases, which present different aspects of this situation.

A 'bargaine'<sup>1</sup> was made between Roger Denys, a 'Freemason' of London, and defendants, that the said Roger should build 'l'esglise et le steple de la . . . ville de Wyburton'. The precise terms of the contract were reduced to writing, and incorporated in an obligation under seal. The mason was to receive £190 for his work. Subsequently 'bargaine ceo prist saunz especialtee' between the same parties: Denys was to build twelve corbels in the church, and make certain alterations in the steeple, for which work, in as much as it was beyond the requirements of the original contract, he was to be paid 'a taunt come il expenderoit entre la faisaunce de le dit overaigne outre le primer covenaut'. Apparently this sum was not fixed by the parties, but four masons of freestone estimated it at 100 marks. Defendants later refused to pay this additional sum. Denys asserts in his petition that he can have no action against them 'par brief de covenaut ne en autre manere' at common law. Covenant, of course, would not lie on a verbal promise; but it is a little puzzling at first to see why Debt could not be brought. However, there is nothing to show that there was any statement as to how much the mason should have had for his work: the sum was indefinite;<sup>2</sup> and secondly, any attempt to prove the parol

<sup>1</sup> This case does not really represent the modification of a deed by parol. The new agreement was in fact a new contract. I have put the case here, however, because it represents a kind of borderland.

<sup>2</sup> 'A promise to pay as much as certain goods or services were worth

agreement would be met by the introduction of the deed, behind which a common law judge would not go. At all events Denys filed a petition in equity, and asked that the defendants be summoned 'de respoudre a les premisses'.<sup>1</sup>

Complainant bought 'certeyn Bales of Wode' of one Thomas Clement, and bound himself in an obligation of £27 by way of payment. Clement warranted the woad to be according to sample, but it proved inferior; upon discovering this, complainant went to Clement and threatened to bring an action of Deceit. An agreement was then made that complainant should pay only the actual value of the woad, and this 'payment' was to take the form of dyeing cloth for Clement. Complainant did the work, Clement was satisfied and promised to deliver up the obligation, but shortly afterwards he died. The obligation came into the hands of his executors, who refused to give up the obligation 'as gode faith and conscience wold', and brought an action upon it. Complainant appealed to the chancellor.<sup>2</sup>

An obligation of 10 marks was made in payment for a 'last of rede heryng'. Before the day of payment it was agreed 'bi trete' between the parties, that the obligor should have 'longer day of payment of the said x mark if... (he) ... coude fynde other suerte to be bounde therfor...' The sureties were found, and bound themselves, but the obligor incautiously left the original obligation in the hands of the obligee, who is now bringing suit against the obligor, though the sureties 'have trewly kept every day of the secunde obligation'. The obligor appeals to the chancellor, praying that the obligee may be compelled to deliver up the original obligation and to withdraw his suit.<sup>3</sup>

With regard to these cases we may note the following points:

(1) The original contract was under seal; the subsequent and modifying agreement was by parol.

(2) In each case the complainant has altered his position on the strength of the defendant's promise; in the first case he did additional work, in the other he has in fact satisfied the

would never support a count in Debt.' Ames, H. L. R., viii. 260. When later it became the practice to declare in *Indebitatus Assumpsit* though no price had been fixed by the parties, we see a departure from principle. Ames, *loc. cit.*

<sup>1</sup> VII. 104, Cases, p. 177.

<sup>2</sup> XV. 5.

<sup>3</sup> XVI. 444.

obligation, though not according to its terms. He has a plain *moral* right to the relief he seeks.

(3) The defendant occupies a strong position, but its strength lies purely in technicalities. If these be brushed aside, and the plain equities of the individual situation regarded, the obvious right of the case is with the complainant.

What did the chancellor do in such a situation? A categorical answer is impossible from the limited evidence available.<sup>1</sup> The difficulty of the complainant in each case was due to the fact that he had neglected from ignorance or carelessness to avail himself of his legal rights, and this was one of the notorious grounds on which equity took jurisdiction.<sup>2</sup> But we can state this only as a strong probability.

*V. Inquiry into the consideration of sealed instruments.*

We come now to the final class of cases: those in which the obligor never obtained the benefit for which he executed the obligation. In modern phraseology, the consideration has failed. The situation becomes plainer from a practical example. Richard Cordie purchased a house and forty acres of land of Thomas Rose. He bound himself to the said Thomas in an obligation, by way of payment, but shortly after going into possession, he was ousted by the lord of the manor; nevertheless Thomas is bringing suit against Richard on the obligation, 'sur quele grevaunce le dit Richard n'ad mie remedie al le comune ley', wherefore Richard appeals to the chancellor.<sup>3</sup> Again, an obligation was made in payment for land under a marriage contract, but the land was never conveyed; complainant comes to equity, for 'by way of conscience . . . the said obligation [ought] to be void because the said William (the obligee) perfourmed not his covenant'.<sup>4</sup> So, too, where an obligation was made for the price of woad, which the vendee subsequently refused to deliver.<sup>5</sup> Examples might be

<sup>1</sup> I do not mean to imply that I have exhausted the evidence. The catalogues of the Chancery Proceedings indicate that there were numerous appeals of this nature. But limitations of time have prevented me from examining all of them.

<sup>2</sup> See Vinogradoff, *L. Q. R.*, xxiv. 381.

<sup>3</sup> IX. 405 (1440), *Cases*, p. 183.

<sup>4</sup> XIX. 38.

<sup>5</sup> X. 195.

multiplied,<sup>1</sup> but these are sufficient for illustration. The same situation may assume various forms, but in the end we come back to this: the obligor has received nothing, but despite this the obligee, relying on his sealed instrument, is bringing suit against reason and conscience. The failure of the consideration is total; the enforcement of a deed under such circumstances would be inequitable. If equity cancelled an obligation where the purpose for which it was made had been accomplished, is there any reason to doubt that it gave aid in these cases? Though we have no positive evidence from any indorsed petition, it is confidently submitted that complainants had good reason to expect relief from chancery.

### SECTION III. PETITIONS FOR THE RECOVERY OF 'DEBTS'

If the common law provided any remedy which was adequate and effectual, it would seem to be Debt. The scope within which it acted was clearly recognized and defined; it was an action in very general use. We may therefore be somewhat surprised to find that many appeals are made to chancery to recover money due for the sale of goods, for services rendered, &c.—cases in which there is obviously a *quid pro quo*, and upon which Debt ought to lie. The period we are considering, however, is the fifteenth century. Debt had not yet attained its full stature, and *Indebitatus Assumpsit* was a thing unheard of. The problem before us is this: Did equity to any extent usurp the field of Debt, and did it provide a remedy in analogous cases though none existed at common law? The cases to be considered therefore fall into two groups:

I. Cases in which the common law in theory provided a remedy (i. e. by way of Debt).

II. Cases where there is no remedy at law.

<sup>1</sup> e. g. X. 54; X. 59 (Obligation made in payment for fruits of a church which obligor was never permitted to receive); XIX. 4 (Acquittance made on promise to pay a debt—debtor after receiving acquittance refuses to pay); IX. 64; *idem* XIX. 410.

I. *Cases in which the law theoretically provides a remedy.*

We find numerous cases before the chancellor, in which no reason for the appeal is set forth in the petition. Clerks of chancery claimed the use of the subpoena as of right; and the mere allegation that one was such a clerk seems to have sufficed.<sup>1</sup> Other cases are more puzzling. Goods are sold and the price fixed; it appears to be a plain case of Debt, and yet the petitioner confidently comes to equity, without troubling to allege any reason for so doing.<sup>2</sup> We are somewhat at a loss to account for the jurisdiction.<sup>3</sup> It is more usual, however, to find some specific ground of appeal set forth in the petition. These grounds are interesting and worthy of note.

1. As we have already seen,<sup>4</sup> the poverty of the complainant, or the great power and maintenance of the defendant, often explains the presence of the case in equity. Nor was common law process always effective; there were light-footed debtors who moved rapidly from county to county, and the only means of fixing the attention of such vagrants seems to have been a subpoena.<sup>5</sup> Furthermore, one transaction might include several elements. Land might be sold, and a bond executed by the vendor to ensure conveyance. If after the land was conveyed, the vendee refused to pay the price and still kept the bond, the vendor's position at law was awkward. If he brought Debt for the purchase price, he could not at the same time recover the bond, and if it were simple (as often happened),

<sup>1</sup> e. g. VI. 299, *Cases*, p. 177. Complainant describes himself as 'un des clerks del Chauncellerie nostre Segnur le Roy'; the simplicity with which he states his case is noteworthy. The 'luy doit et luy detient' recalls the count in Debt. And see IV. 76 (where the defendant is a clerk).

<sup>2</sup> XI. 454. Defendant 'bargaynyd and bought' of complainant certain hops and garlick. It was agreed that there should be made 'billis indented and inselyd be the parties aforseid of and for the certeynte and fulfylling of the bargayn', in trust of which complainant delivered the goods. The price was fixed, and it seems that Debt would lie. Complainant, however, appeals to the chancellor, without alleging any reason.

<sup>3</sup> See XI. 8 a, *Cases*, p. 185. Complainant, who is seeking to recover rent due on a parol lease, asserts that he is without remedy, because he has 'no wrytyng to ground him apon at the comyn lawe'. It is not clear why Debt would not lie in such case.

<sup>4</sup> *Supra*, p. 78.

<sup>5</sup> e. g. IX. 324. *Vide supra*, pp. 80-1.

it would still be hanging over him. If, however, he could bring the vendee before the chancellor, he might recover the purchase price and at the same time obtain an order for the delivery and cancellation of the bond.<sup>1</sup> The defence against the bond was purely equitable; the claim for the price was recognized by law; but in the early chancery jurisdictions, which had no set limits, there is good reason to suppose that the two might be combined. Once equity assumed jurisdiction on any ground, it disposed of the whole matter.

2. In Debt, the debtor could always wage his law. Early in the fifteenth century<sup>2</sup> we find creditors asking for a subpoena, because if Debt is brought the defendant will acquit himself on oath. 'A cause que le dit John (complainant) n'ad null especialte . . . le dit William (defendant) soy purpose de gager sa ley'<sup>3</sup>, exclaims one petitioner, who adds that in consequence he has no remedy by the common law. There is pretty good evidence that relief was granted. Witness this case:<sup>4</sup>

Two were indebted to complainant 'in certain sums of money w<sup>t</sup> oute specialte'. They refused to pay, and complainant, knowing they would wage their law 'agens faithe and good conscience', sued to the chancellor, and writs were issued; one debtor appeared, was examined and made agreement with complainant, but the other could not be found. Therefore complainant now appeals again, and asks for a writ against the defaulting debtor.

Evidently the debtor who appeared would not have come to agreement, unless he feared compulsion.

Even where the petitioner had already brought his action at law and it had failed for the above reason, he was not barred in equity. Indeed, the *actual failure* of the attempted legal remedy is sometimes stated as the specific reason for coming to equity. The defendant did his law that 'he owed your seid besechers ne peny . . . where of your seid besechers have notable witnes and profes of þe contrarie . . .',<sup>5</sup> recites a petition. Always the complainant makes offer of further

<sup>1</sup> See IX. 147, where this is the relief sought.

<sup>2</sup> At least as early as 1413, in all probability. See VI. 85.

<sup>3</sup> VI. 85.

<sup>4</sup> IX. 335, *Cases*, p. 182.

<sup>5</sup> XVI. 386.

proof of his just debt, often by parol evidence, sometimes by way of examination of the debtor. He is convinced of the inherent justice of his case; all he desires is that the whole matter may be heard in chancery.

In the above cases, equity is plainly appropriating to itself the jurisdiction of the common law. We pass now to situations which fell outside the range of common law actions. Naturally these are the commoner cases.

## II. *Cases in which no remedy is provided at law.*

John Paynell sold 'xix balettes of wode for a certain sune of moneye' to 'Mald, the wyf of Robert Hynde'. Mald apparently traded by herself, for it is stated that she 'paieth daly to other diverse merchants and fulfilleth the covenantz that she maketh with hem, her husband not pryvy therto, ner entermetyng of the hous ner the occupacion ther of...'. Complainant cannot hold the husband, for he was not a party to the contract and there was no specialty. If he should bring Debt<sup>1</sup> against Mald she would allege that she 'is no sole marchant and under covertour de Baron'. He has parted with his goods, he cannot recover against the husband, nor the wife, nor could he successfully join them, at common law. In this dilemma he appealed to the chancellor and prayed for a subpoena against Mald.<sup>2</sup> We do not know what relief, if any, was granted. The situation is typical of many presented by the technicalities of early common law. We shall now attempt to classify the cases and consider them in groups. It is to be remembered that in all these cases the complainant is in equity because even in theory the law cannot assist him.

1. The debt is proved by an obligation which has been lost or destroyed.

At common law a deed so far absorbed the debt of which it was evidence that it became the debt itself. It would

<sup>1</sup> By custom of London a *feme covert*, trading by herself in a trade with which her husband did not intermeddle, might sue and be sued as a *feme sole*. Pollock, Contracts (7th ed.). 83, citing Bacon, Abr. Customs of London, D.

<sup>2</sup> IX. 472.

follow logically from this that the loss or destruction of the obligation meant the loss of the debt, and such was the rule. Equity, however, showed no particular respect for the seal. As we have seen, evidence of payment was admitted against a deed, though not supported by specialty. By parity of reasoning, a creditor who had lost his deed, but still had good and sufficient proof of his debt, ought to obtain relief in equity. We are not therefore surprised to find appeals such as the following :

Complainant, as executor of one Anne Hay, seeks to recover £12 due from the defendant for goods sold. The defendant bound himself by an obligation, which was delivered to Anne, but complainant cannot find it, 'which the seid Richard (obligor) knoweth right wele and how be it he knoweth also right wele that he delyvered unto the seid Anne the seid obligacion in her lif as for his dede and dutie, and that he never contented her nor any other in her name any peny of þe same dutie as he hath many tymes confessed . . ., yet he wol in no wise make contentacion of þe seid money by cause he knoweth wele that your seid Oratour can not fynde the seid obligacion.' As complainant is without remedy at law he comes to the chancellor and prays for relief.<sup>1</sup> Defendant in his answer denies all the allegations of the complainant.<sup>2</sup>

Again, where an obligation was taken by persons unknown from the obligee,<sup>3</sup> and the obligor 'nought w<sup>t</sup> seyng the seide dette, exscuteth hym by the seide obligacon, as apereth by record of her plee a fore the Justice of the comyn place', the obligee comes to the chancellor and prays for a subpoena. Appeal is made because an obligation has been lost,<sup>4</sup> or stolen,<sup>5</sup> or has been burned<sup>6</sup>; in all these cases complainants come forward and pray aid, because they are without remedy at law. The obligor, sure of himself so far as common law process is concerned, refuses to pay. It should be noted that the complainant always alleges the cause for which the obligation was made, as for goods sold, or services rendered, &c. :

<sup>1</sup> LIX. 212.

<sup>2</sup> LIX. 211.

<sup>3</sup> X. 160.

<sup>4</sup> XI. 160. This is a good example and is reported in full, see *Cases*, p. 186.

<sup>5</sup> 'The which obligation was taken away from your seid besecher by persons to hym unknowyn in the troublouse season.' XXVII. 68.

<sup>6</sup> LXVIII. 49.

likewise he is ready to prove to the satisfaction of the chancellor that a just debt exists.<sup>1</sup> The situation in equity is the same as if there had been no deed at all ; the primary question is, what are the facts of the particular case? If the defendant is withholding something that in right and conscience belongs to the complainant, there is every reason to suppose that the chancellor will not let a mere technicality of law obstruct justice. We have no petitions here endorsed with judgement ; but the general trend of reasoning in equity lends support to the view that relief was granted.

## 2. Transactions abroad.

We have already adverted to the fact that the common law did not assume jurisdiction over contracts made out of England. In consequence, if a debt arose from an obligation made abroad, or from money lent or services rendered out of England, the action of Debt would not lie. In such cases petitioners appealed to equity.<sup>2</sup>

## 3. Actions against executors.

The action of Debt did not lie against the executors of the debtor, unless the debt were proved by specialty ; for by the theory of the common law in any case where a debtor might wage his law, no recovery was allowed after his death, as the personal representatives could not acquit themselves on oath of the debt of the deceased. This arbitrary though logical rule was provocative of much hardship, for most executors stood staunchly on their legal rights ;<sup>3</sup> in any such case the creditor's only possible relief was by the subpoena. After Assumpsit supplanted Debt, it was doubted whether it lay against any one save the original debtor ; indeed, the right of

<sup>1</sup> e. g. XIX. 410. The defendants were bound to complainant in an obligation of £20. Afterwards it was ' accorded ' between the parties that the defendants should deliver to the complainant ' moevable goodes, catelle and money ' to the value of £20, and thereupon the complainant made and delivered to defendants an acquittance. Now the defendants will not deliver the goods, and if complainant sues at law, they will stop action by the acquittance ; yet the debt in equity and conscience is not discharged. The prayer is for general relief.

<sup>2</sup> This has already been considered, *supra*, p. 76.

<sup>3</sup> In X. 289, the complainant says that the defendants (executors) refuse to pay their testator's debts, because they know they cannot be compelled so to do at law.

the creditor against the personal representative of the debtor was not definitely settled until 1612.<sup>1</sup> From the following cases there is at least a strong presumption that the chancellor anticipated the common law by nearly two hundred years.<sup>2</sup> The cases are chiefly those in which the petitioner would have had an adequate remedy at law except that death intervened. For example:

One John Faireman, 'pur certeinz infirmitiez quy il avoit,' retained the complainant 'pur estre son fisision et luy faire d'estre seyn de son maladie'. It was agreed that five marks should be paid for the cure. The complainant 'par son diligent labour fist le dit John seyn de son dit maladie', but before the five marks were paid, the patient was inconsiderate enough to die. His executrix appears to have entertained some scepticism as to the efficacy of the cure; at all events she refused to pay the 'fisision', and he made petition in chancery and prayed for a subpoena.<sup>3</sup>

The petitioner seeks to recover the price of merchandise sold to the defendant's testator. He says that 'of grete trust and confidence that your seid Oratour had to the same John (the testator), he neither toke ne had obligacion ne other writyng for the same dueteez'. The testator died before the day of payment, leaving the defendant, his widow, his executrix. Complainant often asked defendant for the debt, and though 'ther been comyn to the handes of the seid executrice godes that were of the seid testatour sufficient to pay and content all his dettes, legatee, and other ordynarie charges, yet that to doo (i.e. pay complainant) the same executrice utterly hath denyed and yet doth, In which case your seid Oratour hath noon remedie by the comone law but oonly by this Courte of conscience'. He prays that defendant may be ruled to do what reason and conscience require.<sup>4</sup>

Complainants make much of their helplessness because they have no specialty. One says he has 'none escript obligator nor none oder mater by þe ywych ye sayd John (defendant), executour, may be charged to pay ye said x marc as executour

<sup>1</sup> *Pinchon's Case* in Ex. Ch. 9 Co. Rep. 86 b. See discussion in Pollock, *Contracts* (7th ed.), 202, Note G.

<sup>2</sup> See VI. 20 (c. 1425), *Cases*, p. 175.

<sup>3</sup> XII. 248. <sup>4</sup> LIX. 103.

at ye comone law'.<sup>1</sup> Another laments that he has no deed, but only 'his (i. e. the debtor's) worde'<sup>2</sup> for payment, and he is dead. Land is sold, and the price 'parentre eux (i. e. the parties) accordee saunz ascun seurte eu de dit William (vendee) par obligacion ou en autre manere sinon par simple contract',<sup>3</sup> and as death has intervencd the simple contract is of no avail. We might multiply instances, but those which have been quoted show the typical method of appeal.

There is a further question. Was it enough to show that the testator would have been liable for the debt had he lived? Apparently not; the complainant must go further and prove to the court that the executors have assets of the testator sufficient to pay his debts. The frequent appearance of such allegations<sup>4</sup> leads us to suspect this; and certainly it would be contrary to all the principles of equity to charge an executor in his own goods for his testator's debts.

Unhappily, I cannot present any cases endorsed with judgement; so, as before, we must fall back upon inference. The reason for intervention is plain. The debt should justly be a charge upon the debtor's estate; the mere accident of death ought not to defeat so just a claim. The constant application for subpoenas against executors leads irresistibly to the conclusion that the chancellor granted relief.<sup>5</sup> Our conclusion is, moreover, supported by the declaration of a chancellor reported in the Year Books: 'si on n'ad ascun escript et son

<sup>1</sup> XI. 275. See IX. 40; XI. 237; LIX. 93 ('no specialty in writyng'); also cases cited, *infra*, note 5. This is a very common allegation.

<sup>2</sup> XXX. 18.

<sup>3</sup> XI. 79. And see VI. 20, *Cases*, p. 175.

<sup>4</sup> Thus one petitioner says that the executors have 'in their handes goodes sufficiant of the said testatour and more...' XV. 234; and see XI. 99; XIX. 103 (Executors were enfeoffed of land for the purpose of paying debts).

<sup>5</sup> It was impossible for me to take down all the cases even in the bundles which I have examined. The following are thought to be representative: VI. 20, *Cases*, p. 175; VI. 71 (for goods sold: only part of the price paid); VII. 136 (money lent and goods sold); IX. 134; IX. 153 (payment for land); IX. 221; IX. 337; IX. 430; IX. 431; IX. 434 (for a horse sold); X. 178; X. 268 (on parol grant of testator); X. 289; XI. 79; XI. 237; XI. 275 (executor of vendor *v.* executor of vendee); XI. 413; XII. 248; XV. 234; XVI. 385; XIX. 103; XXX. 18; XXX. 50; LIX. 60; LIX. 93; LIX. 103. Appeal is made even where there is no executor or administrator, but the defendants have taken the intestate's goods out of the manor with the intention of defrauding the creditor: V. 102.

debtor meur', nul remedy per le comon ley; et uncure icy per ce Court in conscience il aura remedy.'<sup>1</sup>

4. No definite sum has been agreed upon.

Goods might be sold or services rendered without any stipulation as to the precise amount of payment. Thus tithes were sold, and it was agreed that buyer should pay 'selonque le prys que greynes furent comunement venduz'<sup>2</sup>; again, an agreement was made that the defendant should assume control of the plaintiff's lands and pay over the excess in yearly value beyond £6 10s.<sup>3</sup> In either case, evidence would have to be introduced to fix the amount which was due.

Such situations resulted from many informal agreements. Thus, to take the case of services rendered, note the following:

Complainant was 'reteyned with Thomas, Abbot of the Church of Malmesbury to thentent to labour and sue for one William Stevenes of Mynty, Bondman to the seid Abbot, whych was endyted of felony a fore the Justices of peas...' The Abbot promised to recompense complainant of all costs and expenses and to pay him for his labour. Complainant sued out a Corpus cum causa, and Stevenes was taken 'to bayll', but later made escape; and for this default, complainant had to pay heavily. Now the defendant (the Abbot) refuses to pay, and complainant says he has no means of recovery at law.<sup>4</sup>

This case is typical. It appears to have been common to request a person to undertake certain work, and promise to pay for all expenses incurred as well as to give a suitable reward.<sup>5</sup> Necessarily, the amount to be paid could not be definitely agreed upon beforehand.

<sup>1</sup> Y. B. 7 H. VII. 10. 2.

<sup>2</sup> IX. 452.

<sup>3</sup> XXXI. 120.

<sup>4</sup> XIV. 1.

<sup>5</sup> e. g. An Abbot appointed the complainant his 'procuritour . . . de persuer en la noune de dit Abbe diverses materes et causes devaunt noster seynt pier le pape en la courte de Rome'. He promised to pay the expenses, and also reward the complainant. The work was done, and then the Abbot refused to pay. VII. 292.

Again: A letter was sent to complainant while at Rome, requesting him to purchase 'un bulle de grace que est appelle un pluralite'. Promise was made to pay the costs, &c. Complainant obtained the bull and sent it

The petitions cited fall within the fifteenth century ; indeed, one may possibly be as early as 1391.<sup>1</sup> Complainants state with uniformity that they have no remedy at law. Is this true? The only common law remedy available would have been Debt, which lay only for a sum certain. The uncertainty of the amount precluded the use of that action. However, the complainant has done the work, and it has not been done officiously, but at the request of the defendant. In later times, Indebitatus Assumpsit would have come to the rescue ; it is submitted with some confidence that the chancellor afforded relief much earlier.

5. The promise to pay is implied.

This may be considered a corollary to the principle in the cases just considered. Goods are sold, but there is no promise to repay ; services are rendered on request under the same circumstances. I am able to present only two petitions, but they are of great interest :

Complainant was 'factor et attorne en la faite' in Prussia to the defendants. Defendants purchased certain merchandise in Prussia, and for default of payment it was seized by the vendors, whereupon the defendants sent a letter of attorney to complainant 'luy requirant de pursuer pur la recoverer' of the merchandise. He did so and incurred great expense ; when he returned to England he 'allegea la dite lettre d'attorne en son accompte et demaunda estre aloue de toutz les despenses et costages faitz solonque la fourme de dite lettre . . .' ; which defendants refused to allow.<sup>2</sup>

Where a complainant is seeking to recover the price of goods taken, he sets up his case thus<sup>3</sup> :

'Also the said Robert Saxby toke of your seid besecher

back to England ; but the defendant refused to pay the costs. XI. 328 (c. 1431).

See also : X. 325 (Complainant 'hath effectually spedde a prorogacion of a pluralite' at defendant's request : there was a promise to pay the costs) ; XIX. 295 (Suing to the king at defendant's request : promise to pay costs) ; LIX. 169 (Complainant was requested by the defendant to secure certain writings in Spain : promise to pay expenses and give a 'resounable reward for his labour').

<sup>1</sup> VII. 292. Addressed to the Archbishop of York.

<sup>2</sup> IX. 223 (1435-6).

<sup>3</sup> XI. 573.

iiiij bowe staves w<sup>t</sup> oute any price or payment mad be twene hem . . .'

'Also Peers Wympryngham and John Skandylyhy, bailyffs of Grimesley toke of your seid besecher w<sup>t</sup> oute liveraunce or paiement made vj bowe staves.' Complainant says he is without remedy at law.

The promise is implied from the circumstances of the case. It was precisely this situation which was met in the seventeenth century by allowing the 'quantum meruit' in *Assumpsit*. Surely it is not without significance that an attempt was made to secure the same kind of a remedy in equity in the early fifteenth century.

#### 6. Benefit conferred on a third party.

A benefit conferred upon a third party at the request of the defendant would not support Debt<sup>1</sup> in the period which we are considering. However, it was made the basis of appeals to the chancellor. Thus we find complainants making appeal where they have ransomed a prisoner,<sup>2</sup> paid over money,<sup>3</sup> or said masses for the soul of one deceased,<sup>4</sup> at the request of the defendant.

#### 7. Assignment of debts.

The common law regarded the relation between creditor and debtor as an intensely personal one; in consequence, the right of action which arose from such relation could not be assigned either by act of the parties or by operation of law.

<sup>1</sup> The dictum of Moyle J., in *Y. B. 37 H. VI. 9. 18*, did not become established law till after the fifteenth century. See Ames, *H. L. R.*, viii. 262-3.

<sup>2</sup> XLIV. 272 (Defendant promised to pay complainant £20 if he would deliver one B out of prison in 'the mount seint Mighel'. Complainant delivered B, but defendant refused to pay. He asserts that there is no remedy at law).

<sup>3</sup> XI. 361 (Money paid to a third party at the defendant's request). XV. 248 (X borrowed a certain sum of Y, leaving in pledge jewels of greater value than the debt. Later he desired a further loan, and Y, being unable to lend the money himself, desired complainant to advance it to X, and expressly 'undertoke to youre seid besecher that he shulde be paied truly'. Complainant made the loan; subsequently X repaid both loans to Y, but Y never paid complainant. Y is dead, and complainant asks for relief against his executors).

<sup>4</sup> VII. 79 (Perhaps it is stretching a point to treat a departed soul as a third party).

To a certain extent this notion was modified<sup>1</sup> by allowing the personal representatives to recover the debts of the deceased; but, as we have seen, the common-law judges showed great reluctance in allowing any corresponding right *against* the representative of the debtor. At all events, it was a settled rule of law that a chose in action was not assignable, at least not so as to enable the assignee to sue in his own name. This rule was the logical outgrowth of the conception<sup>2</sup> above referred to, and was strictly enforced throughout the history of the common law. If the assignee wished to bring any action at all, he must bring it in his assignor's name.<sup>3</sup>

The practice in equity was otherwise. Among the earliest petitions preserved, we find assignees seeking to recover in their own names debts which had been assigned to them:

1413 (?)<sup>4</sup>: Defendant owed X £50. X, desiring to compensate complainants for injuries done them, wrote a letter under his seal requesting defendant to pay over the £50 to complainants. X died, and defendant refused to comply with the request. Complainants, having no remedy at law, pray for a subpoena.

1432<sup>5</sup> (probable date): X was 'fermour' to Y, paying for seven years £35. Y by letter under his seal assigned the £35 to complainant. X died and his executors (defendants) refused to pay. Complainant says he has 'nothyng to shewe in especial save such bokes of a Countes', but no 'mater to recuver atte comene lawe'.

1432<sup>6</sup> (probable date): Freight for wine was assigned to complainant when he purchased the ship in which the wine had been transported.

<sup>1</sup> Mr. Ames (Anglo-Am. iii. 581) says that this was not a modification 'since the representative was looked upon as a continuation of the *persona* of the deceased'. But, if this statement be correct, Debt should lie *against* as well as *for* the personal representative. The very reason alleged for not allowing Debt against the personal representative (i. e. that only the original debtor could wage his law) seems to reflect the intimate personal relation between creditor and debtor.

<sup>2</sup> Coke's explanation (*Lampel's Case*, 10 Co. Rep. 48 a), that the origin of this rule is attributable to the desire to discourage maintenance and litigation, is effectually disposed of by Mr. Spence (2 Spence, 850).

<sup>3</sup> The Year Book cases are carefully analysed in Pollock, Contracts (7th ed.), Appendix, Note F.

<sup>4</sup> VI. 141. Addressed to the Bishop of Winchester. The date cannot be fixed with certainty.

<sup>5</sup> IX. 337.

<sup>6</sup> X. 74.

1432<sup>1</sup>: Debts assigned to complainant 'in recorde of the Mayre of Caleys'. Afterwards the debtor in London 'a fore worthy men knowleged the dewete and payment ther of to be made to your seyde suppliaunt'. Nevertheless he refused to pay.

1432<sup>2</sup>: As security for a loan from complainant, X delivered (bailla) two obligations to him, by which W. and T. were bound to X, the intention being that payment be made to complainant. To this W. and T. agreed at X's request; X died, leaving no property; W. also died. Defendants (W.'s executor and T.) refused to pay complainant, who is without remedy at law.

1450<sup>3</sup>: Defendant was indebted to complainant's father in 10 marks 12 shillings. The father died and his executrix 'graunted the seid x marc xij s. to your seid besecher for parcell of his fynding at London'. Defendant agreed to pay complainant and did pay part of the debt, but afterwards refused to pay the rest. Complainant asks that the defendant may be compelled to pay.

It is impossible to determine whether it was necessary that the debtor should agree to pay the assignee. In only two of the above petitions is any such agreement expressly alleged. Nor is it apparent whether or no any 'consideration' was required for the assignment; it seems probable that at this time it was not. Some three hundred years later it was assumed as common knowledge that an assignment of a chose in action was valid in equity without any consideration.<sup>4</sup> The petitioners in each case claim the debt as belonging to them in reason and conscience.

From cases of assignment are to be distinguished those of substituted agreement, that is, where a new liability is substituted for the old. This is what we should now describe as novation, but it did not exist at common law before Assumpsit was allowed on mutual promises.<sup>5</sup> We may note two early cases in equity.

<sup>1</sup> XI. 47, *Cases*, p. 186.

<sup>2</sup> X. 17, *Cases*, p. 184. Cf. with this the statement in Y. B. 15 H. VII. 2. 3.

<sup>3</sup> XIX. 151.

<sup>4</sup> 'And first it was admitted on all sides, that if a man in his own right be entitled to a bond or other *chose in action*, he may assign it without any consideration.' *Lord Carteret v. Paschal*, (1753) 3 P. Wills. 199. The remark is *obiter*. As to the ultimate requirement of valuable consideration, see Spence, Eq. Jus. ii. 852. <sup>5</sup> Ames, Anglo-Am. iii. 584.

1475<sup>1</sup>: One Harry Denne owed complainant £8. Defendants at the request of Denne 'became dettours and promysed to pay your said Oratour . . . the said summe of viij li. at a certeyn day . . . , uppon trust onely of which promyse your seid Oratour acquitted and discharged the seid Harry Denne of the viij li. and toke them dettours for the same . . . ' Now defendants, contrary to conscience, refuse to pay and complainant has no remedy at law.

1475<sup>2</sup>: K. was indebted to complainant in £10. She desired complainant to accept her son (the defendant) as debtor in her stead. Defendant, at the request and desire of K. 'made feythfulle promysse before sufficient Recorde to content, satisfie and pay . . . ' the said £10. 'Upon truste of such promysse to have ben trewly fulfilled . . . ' complainant discharged K., and took defendant as debtor. He now refuses to pay, and complainant is without remedy at law.

In conclusion, a word may be said about the relief sought. It is obvious, of course, that the creditor wishes to recover his debt; sometimes he asks for the specific sum,<sup>3</sup> sometimes that the defendant may be compelled to pay what is due.<sup>4</sup> More often the relief is asked in general terms, namely that the debtor may be compelled to do what reason and conscience require.

#### SECTION IV. PETITIONS FOR THE RECOVERY OF PERSONAL PROPERTY

We have already noticed the narrow scope of the action of Detinue as it appears in the early Year Books. Detinue 'sur bailment' was the commoner form of the action; Detinue 'sur trover' was used indeed in the fourteenth century, but it did not become a form of action in general use till the next century. It is believed that no small amount of pressure was exerted by the interference of chancery; and that the ultimate development of a right *in rem* at common law, in favour of the owner of a chattel, was hastened by a jealousy of the encroaching equitable jurisdiction.

<sup>1</sup> LIX. 57.

<sup>2</sup> LIX. 75.

<sup>3</sup> VII. 292.

<sup>4</sup> X. 325; XV. 32 (Alternative relief; land was sold, and the prayer is that the defendant be compelled to pay the price or make relivery of the land); XXIX. 18.

In the fourteenth century the disseisee of a chattel had the following remedies: If there were a bailment he might bring Detinue, but in such a case only against his bailee or some one in privity with him. If he brought Detinue 'sur trover' he must show how the chattel came into the defendant's hands; the allegation that the defendant casually found the chattel had not yet become a fiction. Under certain circumstances Trespass would lie, but it sounded only in damages. In no case was there any common law process for compelling the return of a chattel.

There was thus good opportunity for the chancellor to intervene, as the legal remedies were far from satisfactory. Even where Detinue would lie, we find complainants appealing to equity, alleging that because of the defendant's maintenance and power,<sup>1</sup> or the refusal of sheriffs to serve writs<sup>2</sup> the action at law failed. Wager of law is set forth as a reason for coming to chancery. This appears from an interesting case of which the chancellor took jurisdiction.<sup>3</sup> In fact, in many petitions no reason for application to the chancellor is assigned. The petitioner simply states his case, claiming that the defendant has property which belongs to the complainant, and which reason and conscience require should be given up.

The situation will be plainer from several illustrative cases:

c. 1405<sup>4</sup>: X, before going to Normandy, placed his charters in a box and delivered them to the defendant to be kept. X died, and complainant (his heir) asks that the defendant be compelled to deliver up the charters. It is not asserted that there is no remedy at law.

1421-2<sup>5</sup>: Petitioner is the heir of Richard le Scrope. He seeks to recover charters affecting his inheritance, which 'a les mayns de William Mayhewe sont devenus'. *Endorsed*: The defendant is ordered to bring the charters into court.

<sup>1</sup> VI. 92; VI. 140; XI. 84.

<sup>2</sup> XI. 56 (Detinue was brought, but it failed for this reason).

<sup>3</sup> XI. 427 a, *Cases*, p. 187. The petition is endorsed with judgement.

<sup>4</sup> IV. 46.

<sup>5</sup> IV. 158, *Cases*, p. 174. The presence of the case before the Chancellor may be due to the fact that the petitioner was in the wardship of the king. But there were many similar appeals where there was no such reason: e.g. V. 63 (1418); VI. 22; VI. 94 (A widow seeks to recover charters in hands of her late husband's executors); VI. 140 (though here 'maintenance' of defendant is alleged); VII. 174; IX. 417.

1413-1426<sup>1</sup>: Petitioner, before leaving England, put his charters and jewels in a box, and left them in his house. The defendant came to his house, during his absence, to stay with his wife, and treacherously secured the charters. In such a situation petitioner was in a difficulty at law. Detinue would not lie, and Trespass would only give damages.

1432<sup>2</sup>: Complainant bailed goods to defendant in security for a loan of 20 shillings. He repaid the loan and requested defendant to redeliver the goods. Defendant promised to do so, but afterwards sold them to a stranger. *Endorsed*: Order that complainant should recover his goods.

After 1432<sup>3</sup>: X, a foreign merchant, delivered certain goods to defendant at Colchester, to be delivered to him, or his attorney on demand. X gave a letter of attorney to complainant giving him power to receive the goods, but the defendant refused to deliver them. X is being sued for debt by creditors in London, and complainant cannot pay these debts, because he cannot recover the goods.

1438<sup>4</sup>: Edmund, 'Erle of Dors', delivered by the hand of his servant an 'ouche of gold with dyvers precious stonys in hit set' to Gilis, wife of William Norton, in pledge of £20 which he borrowed from the said Gilis. It was agreed that the ouch should be redelivered on payment of the loan. The ouch was worth 100 marks, and the bailee and her husband refused to deliver it up when the complainant tendered the £20, but 'the same ouche hath solde and aloynd'. Complainant asks the chancellor to give him relief as 'by the comyn law ther ys no remedye for the seyd Erle to recover the seyd ouche'.

1439-1440<sup>5</sup>: Petitioner, probably as an arbitrator, was in possession of an obligation. Defendant came to him and asked to see the obligation; 'and whenne he (i. e. defendant) hadde yt, he held yt and wolnot giffe it agayne'. Petitioner attempted to recover by Detinue, but failed,<sup>6</sup> and therefore comes to equity for relief.

<sup>1</sup> VI. 175. Petitioner, however, alleges as his reason for coming to equity, that he is in the service of the Count of Salisbury and hence cannot remain in England to sue at common law.

<sup>2</sup> XI. 427 a, *Cases*, p. 187. Cf. VI. 327, and IX. 109, where an obligation was delivered up by a bailee in violation of the terms of the bailment.

<sup>3</sup> XII. 262.

<sup>4</sup> XII. 206.

<sup>5</sup> IX. 132, *Cases*, p. 180.

<sup>6</sup> He could not allege a bailment, nor could he bring Detinue 'sur trover'; for the allegation of loss by finding was still traversable at this time. The defendant's act constituted a trespass, but the action of trespass afforded no real relief in such a case.

Lack of space forbids the inclusion of further cases. With these, however, as illustrations, we may proceed to summarize our conclusions :

1. Only in chancery could a plaintiff obtain the relief which met the requirements of the case, namely an order for the redelivery of the chattel sought.<sup>1</sup> Equity of course acts *in personam*, and consequently its only means of carrying out the relief was by decreeing that the defendant should give up the chattel in question.<sup>2</sup> It is true that in one case we do find it ordered that the 'plaintiff do recover his goods' ('quod predictus Thomas recuperet bona infrascripta'<sup>3</sup>). This decree is certainly curious, and can scarcely be interpreted literally. It seems to show two things : *first*, that decrees in chancery had not yet assumed absolute and definitive form ; *secondly*, that the chancellor meant simply that his decision of the case was in favour of the complainant, and that he would use such process as lay within his command to make this decision effectual. A contumelious defendant might conceivably refuse to comply with the order and go to prison rather than carry it out. But in the majority of cases appeal to chancery would succeed in its purpose. At all events, equity in the fourteenth century afforded a remedy for the recovery of a chattel which did not exist at law till the nineteenth century.<sup>4</sup>

2. Though the chattel had been bailed, it was not necessary in equity to connect the defendant's possession with that of the bailee ; want of privity did not bar the subpoena.<sup>5</sup>

3. But it was not necessary to allege a bailment, nor to decide the manner in which the defendant obtained possession of the chattel. Apparently, it was enough to show that the complainant had the right (at least a moral right) to recover, and that the defendant in reason and conscience should give

<sup>1</sup> Or to bring it into court. IV. 158, *Cases*, p. 174.

<sup>2</sup> 'Equity . . . acts only *in personam*, never decreeing that a plaintiff recover a *res*, but that the defendant surrender what in justice he cannot keep.' Ames (*History of Trover*) Anglo-Am. iii. 436.

<sup>3</sup> XI. 427 a, *Cases*, p. 187.

<sup>4</sup> *Supra*, p. 33, note 3.

<sup>5</sup> VI. 175. And see especially VI. 245 (10 S. S. 113). See also XXVII. 390 (10 S. S. 150).

up possession.<sup>1</sup> Thus the fact that a charter affected one's right to land was ground for recovery.<sup>2</sup>

4. Though the owner were effectually divested of possession, as by a tort, he was not barred from enforcing his claim to recover his property in equity.<sup>3</sup> At common law his only remedy was by way of damages; but it seems that the chancellor would enable him to follow his property into whosoever hands it came.<sup>4</sup>

In brief, the chancellor, untroubled by any complex theories or any technicalities of procedure,<sup>5</sup> endeavoured to do substantial justice in the individual case. It is difficult to estimate accurately the extent of the use of the subpoena in the recovery of personal property; but from what has been said already it will appear that the influence of chancery in shaping the law of movable goods must have been considerable.

#### SECTION V. SALES OF CHATTELS. PETITIONS AGAINST VENDORS

The petitions brought against vendors on the sale of a chattel fall into two classes. The petitioner is asserting a claim: (1) for non-delivery of the chattel; (2) for breach of warranty.

##### 1. *For non-delivery of the chattel.*

In ordinary cases there would seem to be a plain remedy at law. If the purchase price were paid, or the buyer's sealed obligation for the price delivered,<sup>6</sup> Detinue would lie from early times. The buyer's right was extended in 1442 or

<sup>1</sup> Cases, *supra*, pp. 111-12. And see III. 111 (10 S. S. 81); VI. 94.

<sup>2</sup> IV. 158, Cases, p. 174.

<sup>3</sup> IX. 132, Cases, p. 180.

<sup>4</sup> VII. 119 (Complainant had woad on the high seas. It was seized by robbers and taken to Cornwall, where it was delivered to the defendant. Complainant appeals to the chancellor for a subpoena against the defendant). See also III. 20 (10 S. S. 12).

<sup>5</sup> Cf. X. 151 (One executor endeavours to obtain an obligation from a co-executor. The defendant [the co-executor] refused to take any part in the administration of the estate, and yet would not give up the obligation. No suit could be brought at law, 'because dat de said John was made executour in the fourme aforseid . . .')

<sup>6</sup> The right to bring Detinue where a sealed obligation was delivered was recognized in 1344-5: Y. B. 21 Ed. III. 12. 2 (per Thorpe).

thereabouts, so that he could claim the specific property though he had not paid the price; for Debt and Detinue were regarded as reciprocal remedies.<sup>1</sup> Why then should a vendee appeal to the chancellor? There seem to be the following reasons:

(a) The vendor might have sold the chattel to third parties, in which case it would be useless to bring Detinue. The only remedy then is by way of damages for the loss of the bargain, and that is what the petitioners claim.<sup>2</sup>

(b) Again, if the vendor had no title in the goods at the time of the assumed sale, there would be nothing upon which to base a common-law action. Thus, where one who sold wool had no title to it, the vendee appealed to the chancellor, saying he had no remedy at law because 'the proprete of the said wolles vested not in your said suppliant', for the 'said wolles were not the said John Adam's (the vendor) at the time of the bargain'.<sup>3</sup>

(c) The transaction might not be a sale of specifically ascertained property, but an agreement to provide articles of a certain kind by a certain date. Failure to deliver would be a breach of contract; the basis of the action would be the vendor's non-feasance. This appears to have been the ground of appeal in one very interesting case.<sup>4</sup>

#### 2. *For breach of warranty.*

From early times a vendor was held liable for breach of an express warranty in an action of trespass on the case. We have two petitions brought on the same ground in chancery. The reasons for appearing in equity are interesting:

XI. 512. Woad was sold and warranted merchantable. It proved to be unfit for use. Nevertheless, complainant is being sued at law for the price, and he has no defence at law. He wishes to set-off his loss from the breach of warranty against

<sup>1</sup> 20 Hen. VI. 35. 4 (per Fortescue C.J.).

<sup>2</sup> VII. 201; XLI. 262 (In this case there is a further reason for coming to chancery. The vendor agreed to sell his tithes to the complainant, *in case he sold them at all*. Thus it was not a true contract of sale; moreover, the property was not definitely ascertained, so that Detinue would not lie. Complainant seeks to be recompensed for his loss by this breach of 'Covenant').

<sup>3</sup> LIX. 185, *Cases*, p. 230.

<sup>4</sup> XX. 39, *Cases*, p. 211.

the claim for the price; he therefore comes to the chancellor and prays for a Certiorari, to have the whole case heard in equity.

XXX. 33. Defendant sold cloth, warranting it to be 'trewe marchaunt', &c., but it turned out to be 'motthetyn and rat byten'. Complainant sought to hold the defendant in an action at law, but he 'wold not abide answer in the Kynges Court'; therefore appeal is made to equity.

This affords an excellent illustration of equity supplementing the common law. But the theory upon which the relief was given is not that there is a *quid pro quo*, nor a detriment to the plaintiff. On the contrary, petitioners emphasize the fact that the defendant made a promise or a bargain and did not carry it out. In other words, the claim for relief is based on breach of contract.

#### SECTION VI. SALES OF LAND. PETITIONS AGAINST VENDORS

##### *Actions against Vendors on Contracts to convey Land.*<sup>1</sup>

The cases now under consideration possess especial interest; for it was in this phase of contract that equity developed a remedy peculiar to itself, which never existed at law: specific performance of contract. Specific performance and the injunction remain two enduring features of equitable jurisdiction which persisted in full vigour into modern times, and are indeed conspicuous to-day. Specific performance did not create, strictly speaking, a new substantive right, but it was a new and advantageous remedy. We should, however, observe that it was invented before the common law regarded parol contracts as enforceable; indeed, we hope to show that the chancellor exercised a wide jurisdiction over contract in the fifteenth century where there was no remedy at law. Nowhere is this more conspicuous than in the petitions brought against vendors for non-performance of contracts to convey land. The gist of the action is in each case non-feasance; the vendor has done nothing and refuses to act at all. No action lay at law

<sup>1</sup> Further cases of petitions to compel the conveyance of land are considered in Section VII, *infra*, pp. 123 ff.

until Assumpsit was formally recognized in 1504, and at that time the payment of the purchase price was a condition precedent to bringing the action. Moreover, it was necessary to show that the vendor has expressly undertaken to convey the land; Assumpsit did not originally lie upon a promise or bargain as such.

The discussion falls into three parts: first, the conditions which were necessary to bring the subpoena; second, the parties in favour of whom, and against whom it would lie; third, the relief granted.

1. *The types of cases in which the subpoena is brought.*

There are two features characteristic of the cases brought before the chancellor. In the first place, the agreements are always by parol. If the complainant had a deed, there was a ready common law action in Covenant; it was the lack of any such writing which is most frequently alleged as the reason for appealing to chancery.<sup>1</sup> But secondly, and this is most interesting, we note that the agreements are often very informal. For, while a complainant might allege that the defendant undertook or covenanted to convey land,<sup>2</sup> this is not the usual practice. The common statement is that there was an agreement or bargain, or that the defendant 'sold' the land to the complainant. Petitioners do not take pains to incorporate the facts into any peculiar form of statement; they present informally the terms of an informal agreement, and it is the fact of agreement upon which particular stress is laid. This circumstance seems of such importance that I venture to state one example at length.

One William Serle came to Robert Ellesmere (petitioner) and said that he had certain 'termes' of land to sell. Petitioner wished to see and examine the evidences of title before any bargain was concluded; in consequence, it was agreed that

<sup>1</sup> e.g. complainants describe the transaction as 'par parole saunz escript' (XI. 109); 'by mouthe without writyng' (XI. 485); 'upon covenant without writyng' (XIV. 3), &c.; and conclude by declaring that in consequence they are without remedy at law. Thus, says one, 'your saide suppliant hath no specialty of pees covevauntez . . . so pat þe comone lawe geveof no remedie in þis partie' (XXXIX. 52). This is a typical allegation.

<sup>2</sup> i. e. in the form in which plaintiffs later counted in Assumpsit.

he should come to Serle's house and look over the documents. On the day appointed, petitioner came with George Horton, 'a man of Counsell', who read through the 'evidences' and found them to be satisfactory. Several other people were present, and after some discussion an agreement was reached, and William Serle 'rehered' the bargain to one of the bystanders. Petitioner then stated the terms of the agreement to George Horton, who turned to William Serle and said 'Be ye accordeth in the maner as Robert here hath rehered', the answer was in the affirmative. Afterwards all went together 'To the Swan beside Seynt Antonyes and there they dronke to gederes upon the saide bargayn atte the coste of the saide Robert Ellesmere'. The agreement was that the petitioner should have the 'termes' for £40; and the parties were to meet subsequently when the price should be paid and a deed made, &c. At the time specified the petitioner offered payment, but Serle refused to seal the writing or deliver up the evidences. In consequence, petitioner has lost his bargain, and, as he has no writing of the agreement, is without remedy at law. He prays for a subpoena directed to Serle, and general relief.<sup>1</sup>

The importance of cases of this type lies in the fact that by reason of the very informality of agreement, they were for a long time unenforceable at common law. Yet it is believed that such represent a large number of the ordinary transactions of daily life. The parties were not skilled in the technic of law; but they made a bargain in their own simple way. It was not only fortunate, but necessary, that some one should give protection to such compacts.

There is a still further question. Was it enough to allege a mere bargain, or must the petitioner go further and show that he had suffered damage by relying upon the defendant's promise? In other words, has one of the parties altered his position on the strength of the agreement? There is at first sight some indication that this was so. A most obvious way

<sup>1</sup> XIX. 354 a-354 e, *Cases*, pp. 204-207 (consisting of petition, answer, replication, and three depositions). Cf. XVI. 412, *Cases*, p. 198, which is on all fours with the principal case. There was an agreement to sell land, but 'be cause there was no clerk nor lerned man there to make upp their dedes accordyng to the sayde covenantes, It was appointed and accordid betwixte the saide parties that at a certaine day by them assigned they shuld have met and paied the furst paiement and made upp here dedes'. Defendant refused to make the deed, though complainant tendered the price agreed upon.

in which a complainant might have changed his situation was by payment of part or the whole of the purchase price. In the majority of the petitions I have examined this was the case;<sup>1</sup> it is often alleged as ground for relief.<sup>2</sup> If anything had happened which strengthened the complainant's position, he did not fail to emphasize it. Thus we find it alleged that the petitioner has spent money on the land in making improvements,<sup>3</sup> sometimes even at the defendant's request<sup>4</sup>; again, that the petitioner was put in possession and has subsequently been ousted,<sup>5</sup> or that by reason of holding possession he has been distrained of rent by the chief lord.<sup>6</sup> These are aggravating circumstances which cry aloud for intervention. They represent the strongest grounds of appeal to the chancellor.

There is, however, no conclusive reason for believing that even payment of price was a prerequisite to bringing the subpoena. In fact there are indications which point the other way. We know that at a later date an unpaid vendor might be held a trustee for the purchaser.<sup>7</sup> Finally, there are numerous petitions in which it is not asserted that the price is paid, though the complainant usually adds that he stands ready to pay it.<sup>8</sup>

In conclusion, we may note that in none of the petitions is an appeal made where there was not, in fact, a consideration for the agreement. No attempt is made in these cases to hold the vendor on a bare promise.

<sup>1</sup> Purchase price is paid: IV. 96, *Cases*, p. 173; VI. 58; VI. 176; X. 184; X. 263; XI. 109; XI. 178; XI. 485; XII. 175; XIV. 3; XV. 222; XIX. 101; XIX. 340 a-341; XIX. 404 a-404 b, *Cases*, pp. 207-208; XXXIX. 53; LIX. 86. Part of purchase price paid: IV. 100, *Cases*, p. 173; IX. 207; IX. 409; X. 323; XI. 537; XIV. 16; XVI. 377; XVI. 645; XIX. 59-56, *Cases*, pp. 199-203; XXVII. 16; XXVII. 83; XXVIII. 227; LXX. 148.

<sup>2</sup> e. g. complainant says, 'nient contresteant le paiement devant maynes' the defendant will not make estate. IV. 100, *Cases*, p. 173.

<sup>3</sup> This, in addition to payment of the purchase price: IV. 96, *Cases*, p. 173; XV. 222; XVI. 377.

<sup>4</sup> XXXVIII. 160 (Complainant was in possession of an inn under a parol lease, and expended money thereon at the defendant's request).

<sup>5</sup> IV. 126; XXXI. 189 (Parol lease).

<sup>6</sup> XIV. 3 (The vendor had no estate save in the right of his wife,—and yet complainant, as ostensible owner, was compelled to pay the rent to the chief lord).

<sup>7</sup> Maitland, *Equity*, 251.

<sup>8</sup> Purchase price not paid: IV. 126; VII. 219; IX. 443; XV. 19; XVI. 347; XVI. 412, *Cases*, p. 198; XIX. 354 a-354 e, *Cases*, pp. 204-207.

*2. The parties in favour of whom, and against whom the subpoena lay.*

It seems that rights under the contract might be assigned either by act of the parties, or by operation of law. We find petitions brought by heirs<sup>1</sup> and executors,<sup>2</sup> and by a widow<sup>3</sup> to whom her husband assigned his rights in the land purchased on his death. On the other hand, actions are brought against heirs<sup>4</sup> on the contract of the deceased, where the vendor covenanted for himself and his heirs, and against an abbot's successors<sup>5</sup> where they were expressly bound in the original grant. Whether or no the heir would be liable if he were not expressly included in the contract, we are not prepared to say. But the subpoena was not limited to the original contracting parties. It lay against the feoffees<sup>6</sup> to the use of the vendor to compel them to make conveyance, and even against third parties<sup>7</sup> who had maliciously induced the vendor to break his contract. In the last case, the prayer is that the third parties, as well as the vendor, should be brought before the chancellor to say why an estate should not be made according to the agreement.

*3. Relief Granted.*

*(a) Specific performance.*

It is obvious that there are many cases in which a contract

<sup>1</sup> VI. 176 (Complainant is 'prochein heir a dit Nicoll', the purchaser, who is dead. Purchase price was paid; still defendant has sold to a stranger 'encontre droit et bon concienze'); XIX. 404 a-404 b, *Cases*, pp. 207-208 (Petition by heir. Land sold to petitioner's father; price paid. Now defendant refuses to make estate to the heir after the father's death. In the answer defendant denies that the land was ever sold).

<sup>2</sup> Action by executors, XIX. 101 (Defendant, vendor, was permitted to remain in possession after the purchase price was paid. Vendee died, ordering by his will that the land should be sold. Complainants, executors, have sold the land, but defendant refuses to make estate).

<sup>3</sup> IV. 126 (The widow was in possession, though the price was not paid. She was ousted by the vendors).

<sup>4</sup> XXVII. 83 (In this case part of the price was paid to the heir. This may be a material fact).

<sup>5</sup> XV. 222 (Complainant had paid part of price, had entered into possession, and spent money on the land).

<sup>6</sup> X. 184; XIV. 16; XIX. 59-56, *Cases*, pp. 199-203; XXVIII. 227.

<sup>7</sup> XV. 222 (The vendor by the 'steryng and procurement' of X and Y refused to make estate. Petitioner prays for writs against X and Y as well as the vendor. The chief defendant was not really the vendor, but his successor).

to convey land is broken and damages do not afford an adequate remedy to the disappointed vendee. The land, for some reason, possessed a peculiar value to him; he may have been ready to pay more than the market price. At all events, what he wants is the land, and not some attempted monetary compensation in its place. Complainants do not always ask in so many words for specific performance,<sup>1</sup> but that such is their real desire may be gathered from the case set out in the petition. We observe, for example, this interesting petition which was brought about 1433:

Complainant is Chancellor of the University of Cambridge. The university had determined to found a new college, and in consequence an agreement was made between the defendant and complainant that the Chancellor should 'have a place . . . (of the defendant) adioynnyng on every side to the ground of the seyd Chaunceller and universite', and that in exchange the defendant should have 'a noder place therfor lyeing in the sayd toun'. The place to be given in exchange was, according to the petitioner, of greater value. Complainant spent money in endeavouring to carry out the agreement, but the defendant 'of self wille and wythoute any cause' refused to do his part. The relief sought is that the defendant may be compelled to do 'that trowth, good feith and consciens requiren in this caas'.<sup>2</sup>

The land in this case was especially desired by the university because of its location; no other piece of land nor any amount of damages would be an indemnity for the loss of the bargain. Furthermore, what damage could be assessed? For the petitioner's own statement, the actual value of the land sought was less than of that offered in exchange. No jury, supposing that there were an action at law, could estimate the damages. Specific performance alone would give relief.

Again, it is a common practice to ask for subpoenas against the feoffees to the use of the vendor as well as against the vendor himself.<sup>3</sup> Where this occurs in connexion with a

<sup>1</sup> e. g. complainant asks that the defendant be required to show why he will not make estate: XVI. 645. And see IX. 135 (An agreement was made to exchange benefices. Petitioner is ready to perform his part, but defendant refuses. Relief: 'to sette due remedie for the seide bysecher as reson woll').

<sup>2</sup> XXXIX. 55, *Cases*, p. 221.

<sup>3</sup> P. 120, n. 6.

prayer for a general remedy, we are forced to conclude that the petitioner seeks specific performance and not damages. Otherwise there would be no point in bringing the feoffees before the court. It seems probable, then, that in the majority of cases the petitioner was seeking to compel the vendor to perform his part of the contract, even though he asked merely that he should be compelled to do what reason and conscience required.

We may now turn to the more interesting cases in which performance of the contract is specifically asked for. We find such petitions as early as the reign of Richard II,<sup>1</sup> and by the fifteenth century they have become comparatively common. In the reign of Henry VI there are decrees awarding specific performance, so that we are sure that the chancellor did grant such relief at least as early as the middle of the fifteenth century.<sup>2</sup> The situation of the parties where this relief is demanded is not materially different from that in cases where it is not. However, in all save three of the petitions I have examined, the complainant had paid the whole or a part of the purchase price,<sup>3</sup> but it does not appear that this was essential; sometimes the part of the price advanced, the 'earnest money', was very slight as compared with the price as a whole. The complainant alleges that he has paid part of the price and stands ready to pay the rest, but he does not stress the pre-payment as an especial reason for carrying out the contract. Apparently, it was left for the chancellor to determine whether or no the circumstances of the case demanded a fulfilment of the agreement. Specific performance of an agreement to lease is asked as well as of an agreement to convey.<sup>4</sup> Finally, we should note that in some petitions an attempt is made to obtain the land, though the vendor had already conveyed it to another.<sup>5</sup> The chancellor could not,

<sup>1</sup> *Wheler v. Huchenden*, 2 Cal. Ch. 2; III. 103 (10 S. S. 78). The date of the latter petition cannot be fixed with certainty. It lies either between 1396 and 1399, or between 1401 and 1403.

<sup>2</sup> XXV. 111 (10 S. S. 141), A. D. 1456; 2 Cal. Ch. 27 (where the decree is called an award).

<sup>3</sup> Price paid: X. 184; XIX. 59-56, *Cases*, pp. 199-203; XIX. 101. Part of price paid: IX. 207; X. 537. Price not paid: IX. 443; XXXI. 189; XXVIII. 160.

<sup>4</sup> XXXI. 189 (Parol lease); XXXVIII. 160.

<sup>5</sup> X. 184 (Prior conveyance to another 'to disceyve your seide poure

of course, set aside a conveyance; but it is possible that he might require the feoffees to re-convey to the original purchaser.

(b) Damages and Rescission of Contract.

On the other hand, complainants appeal to the chancellor where the vendor has put it out of his power to fulfil the contract, as by conveying to a third party.<sup>1</sup> Or again, it may be that the vendor had no estate in the land which he assumed to sell,<sup>2</sup> or the contract may have failed from some other reason.<sup>3</sup> These are cases in which the claim is plainly for damages; but most frequently the complainant is asking that the agreement be rescinded, and that he be restored to his former position. Thus, where the price has been paid, the petitioner asks to be recompensed therefor;<sup>4</sup> or if he has spent money on the land,<sup>5</sup> or has been compelled to make payments,<sup>6</sup> he seeks to recover what he has expended. He asks to receive what equity and good conscience require; in other words, that he may be required for the loss he has sustained by reason of the defendant's breach of his agreement.

SECTION VII. PROMISES MADE IN CONNEXION WITH  
MARRIAGE (MARRIAGE SETTLEMENTS)

We have here to consider, not the contract of marriage itself, but promises made, as we should phrase it to-day, in consideration of marriage. Needless to state, these agreements are by parol. The proper form at common law would have been to incorporate the 'accord' in a deed, when the promisee would have had a ready action in the form of Covenant. But only too often the arrangement was made 'without endenture of covenantaunt made of the same',<sup>7</sup> and there was no remedy at law unless the promise had been to

Oratour . . . Subpoenas asked against the vendor and feoffees to whom he had conveyed the land). And see XIX. 59-56, *Cases*, pp. 199-203 (an interesting case with four pleadings).

<sup>1</sup> X. 163.

<sup>2</sup> XIV. 3.

<sup>3</sup> III. 34 (10 S.S. 59). In this case it became impossible to carry out the contract, and complainant asks to be restored to his former position.

<sup>4</sup> X. 163 (Defendant has conveyed to a third party, and petitioner seeks to recover the price paid); XIV. 16; LIX. 86.

<sup>5</sup> XVI. 377.

<sup>6</sup> XIV. 3 (To recover rent paid to the chief lord).

<sup>7</sup> XX. 4.

pay money. If one promised or granted another £10 if he would marry the promisor's daughter, would Debt lie? This question is the subject of endless debates in the Year Books. At first, it is thought that a promise so intimately connected with marriage must be enforced, if at all, in the ecclesiastical courts; later, the judges fall to considering the problem of *quid pro quo*.<sup>1</sup> Despite many dicta to the contrary,<sup>2</sup> it can hardly be regarded as firmly settled that Debt will lie on such a promise until the reign of Elizabeth.<sup>3</sup> There was a decided inclination to allow the action in the fifteenth century; but for one reason or another the chancellor did assume jurisdiction of these cases,<sup>4</sup> perhaps because of wager of law in Debt.<sup>5</sup> Furthermore, if the promise were to make an estate of lands (and in the petitions such are the more frequent), the promisee or beneficiary must find relief in equity or not at all.

The discussion deals with three points: (1) circumstances under which application is made to chancery; (2) the person who brings the subpoena; (3) the relief sought, and the ground on which it is demanded.

#### 1. *Circumstances under which application is made to chancery.*

These petitions reveal an interesting, if rudimentary, form of marriage settlement. The agreement is entirely informal and by parol. This can be better appreciated from a case which happily sets forth the facts with some detail:

A marriage was arranged between Richard Dryffeld and Denys, daughter of Thomas Sele.<sup>6</sup> Dryffeld, the petitioner, states that William Brampton, the defendant, made the 'contracte of Marriage by his owne pursuyng by twene the seid Richard and Denys'; but this is denied by the defendant, who asserts that the said Richard 'laboured to þe seid Thomas, fapen of þe seid Denys . . . of his owen desire willing to have her to wife'. At all events it was agreed that the

<sup>1</sup> Holmes, Common Law, 268.

<sup>2</sup> e.g. Danvers J., in Y. B. 37 Hen. VI. 8. 18.

<sup>3</sup> See Ames, H. L. R., viii. 262; *Appletwhaite v. Northby*, Cro. El. 29.

<sup>4</sup> e.g. XVI. 334 (Petitioner says he has no remedy at law; this is repeated in most of the other cases); XVI. 386, *Cases*, p. 197; XXVIII. 299, *Cases*, p. 213; XXIX. 254; LIX. 65; LIX. 132-3, 137-9, *Cases*, pp. 227-230; LXXI. 7-8, *Cases*, pp. 233-234.

<sup>5</sup> XVI. 386, *Cases*, p. 197.

<sup>6</sup> LXXI. 7, *Cases*, p. 233.

parties interested should meet and discuss a settlement. Brampton, as cousin of Denys, represented her. The petitioner asked for twenty marks 'w<sup>t</sup> the seid Denys'; to which Brampton answered, 'in the name of þe seid Thomas and his frendes þat yf þe seid Richard wold have þe seid Denys to wyf that he and all the frendes of þe seid Denys wold make hir worth x marc in money and in godes.' Dryffeld agreed and the marriage took place.<sup>1</sup>

The promise in this case was made directly to one of the parties to the marriage; but, as other petitions show, it might have been made to his father in his behalf. Especially is this true where the person in whose favour the promise was made was the daughter.<sup>2</sup> A and B agree that A's daughter shall marry B's son, and B promises A that he will make an estate of lands and tenements to the son and daughter on the marriage. Thus:

Agreement ('accorde') was made between petitioner on the one side and John Drayton and his son on the other, that the son should marry petitioner's daughter, and that after the marriage, John Drayton should make an estate to the son and daughter and their heirs. The marriage took place, issue were born, and the son died, 'le dit estat nient fait'. John Drayton refused to make estate; petitioner asks for a subpoena.<sup>3</sup>

The cases fall naturally into two groups:

(a) The promisor has received some substantial benefit in return for his promise.<sup>4</sup> This is the result of a family arrangement. A's daughter is to marry B's son. B agrees to enfeoff

<sup>1</sup> The amount to be paid is in dispute. Petitioner contends it was 10 marks in money, and 10 marks 'in howsold'. Defendant in his answer says it was 10 marks in money and household (LXXI. 8, *Cases*, p. 234).

<sup>2</sup> e.g. XV. 20 a-20 b, *Cases*, pp. 189-191; XV. 140 a-141, *Cases*, pp. 192-194.

<sup>3</sup> VII. 250, *Cases*, p. 179.

<sup>4</sup> III. 104 (10 S. S. 43); IX. 448 (Defendant was one of the parties to the marriage); XV. 140 a-141, *Cases*, pp. 192-194 (Facts were in dispute; after petitioner brought his first petition a 'trete was taken', and arbitrators appointed; one abitrator at defendant's instigation refused to attach his seal to the award. Hence the second petition, No. 141); XXVIII. 52 (Petitioner paid defendant 160 marks; he says furthermore that the marriage took place 'to the grete costagies' of himself); LIX. 132-3, 137-9, *Cases*, pp. 227-230 (An action against the executors of the promisor. Petitioner failed to join all the necessary parties; hence the second petition. In the answer, the defendants make denial of facts alleged by petitioner); LXIX. 98.

the son and daughter of certain lands on their marriage, 'for the which marriage and estates to be made',<sup>1</sup> A agrees to pay B a sum of money. B does not carry out his promise, and A brings a subpoena and prays relief. The marriage was not the sole inducement to the promise.

(b) The promise is gratuitous, that is, the promisor gains no direct benefit from making it. It is said to be made 'for the marriage', or, taking the petitioner's point of view, the marriage was made 'on the faith of' the promise.<sup>2</sup> These cases are more interesting and, so far as my observation goes, more numerous.<sup>3</sup> We have direct and convincing evidence that the chancellor did enforce such a promise.<sup>4</sup> Ordinarily, the promisor is the father of one of the parties to the marriage; but there are petitions where there was no relationship connecting the promisor with the husband and wife for whose benefit the promise was made.<sup>5</sup>

2. *The person who brings the subpoena.*

Naturally, in the majority of cases this is the promisee, even though he were not a party to the marriage. The father claims damages or asks for specific performance on behalf of his son or daughter as the case may be. The promise was made to him, and his is the right to enforce it. But equity went beyond this. Not only did the subpoena come to the rescue of the promisee, but the *beneficiary* might use it.<sup>6</sup> He was not a party to the contract, but the contract was made for his benefit. This is a matter of great interest; for we know that the beneficiary could not bring Assumpsit,<sup>7</sup> and that when Consideration came to be an accepted doctrine, it

<sup>1</sup> XV. 20 a-20 b, *Cases*, pp. 189-191 (Relief is prayed against the defendant and his feoffees; 20 b is the answer of the feoffees, who aver that they are ready to make estate, so soon as certain matters in debate between petitioner and defendant are settled).

<sup>2</sup> IX. 401 (Petitioner says that he 'trusting to the faithful accorde and promys of the said William was married to the said Maud').

<sup>3</sup> VII. 250, *Cases*, p. 179; IX. 401; XV. 116; XVI. 277; XVI. 334; XVI. 386, *Cases*, p. 197; XX. 4; XXV. 111 (10 S. S. 141); LIX. 65.

<sup>4</sup> XXV. 111 (10 S. S. 141) [Endorsed with order for specific performance].

<sup>5</sup> XV. 116; XXIX. 254.

<sup>6</sup> The beneficiary is the petitioner: XV. 20 a, *Cases*, p. 189 (Promisee and beneficiary are petitioners); XXVIII. 299, *Cases*, p. 213; LIX. 65 (Promise made to petitioner's father).

<sup>7</sup> *Crow v. Rogers*, 1 Strange 592.

was held that it must move from the promisee. But there is strong evidence that the rights of the beneficiary were protected in equity; we shall consider this more at length in discussing the principles upon which the chancellor acted.<sup>1</sup>

3. *The relief sought and the ground upon which it is demanded.*

(a) Relief.

For the most part the prayers are couched in general terms; the petitioner desires to have the defendant before the chancellor to show why he 'should not be content after promys made be twix them',<sup>2</sup> but he asks only that the defendant be compelled to do what reason and conscience require. Of course, what is really sought is specific performance; and thus we find it specifically asked that the defendant be compelled to pay the money<sup>3</sup> or convey the land<sup>4</sup> in accordance with his promise. At all events, there was an especial reason why the defendant should be compelled to carry out his promise in these cases. Specific performance was the only relief which was adequate. Often the petitioner, though the promisee, is not the beneficiary. Obviously he is not seeking damages, but rather asking that the beneficiary's rights may be protected. Judging the pleadings as a whole, we conclude that the petitioners are seeking to hold the defendant to his promise; and that the chancellor did grant an order for specific performance. In the interesting case<sup>5</sup> which is endorsed, it is noteworthy that the petitioner was content to set up the material facts, and trust to the chancellor; a decree for specific performance was made.

(b) The ground on which the relief is demanded.

Though, as we have seen, there is a class of cases in which the promisor has obtained a pecuniary benefit for making his promise, it is nowhere suggested that the promise should be enforced on that account. It is true that complainants allege that they have been put to expense on account of the marriage,

<sup>1</sup> *Infra*, p. 164.

<sup>2</sup> LIX. 139, *Cases*, p. 230.

<sup>3</sup> LXXI. 7, *Cases*, p. 233.

<sup>4</sup> XV. 20 a, *Cases*, p. 189 (The relief was prayed against the defendant's feoffees as well as the defendant).

<sup>5</sup> XXV. III (10 S. S. 141).

or that they paid money for the conveyance ; but even in these cases stress is always laid on the fact that the promise was made 'for the marriage'. The facts of the case are such that there was a legitimate 'cause' for the defendant's promise ; he made it deliberately, and has led the petitioner or beneficiary to act on the strength of it. Reason and conscience require that he should carry it out. In consequence, it does not matter whether the promisee or the beneficiary is the petitioner. A promise made to another in the interest of the beneficiary, confers a right in equity upon the latter, just as much as if it were made to him directly. There may have been another factor. In most instances the promisor is closely related to one of the parties of the marriage ; that is, there is the element of blood and natural affection. But I believe that marriage alone was a sufficient cause for the promise, and there are petitions which support this.<sup>1</sup> Whether this may be so or no, it seems to be clear that a promise made 'in consideration'<sup>2</sup> of marriage, at least when the promisor was bound by ties of family to one of the parties to the marriage, was enforceable in equity in the fifteenth century.

#### SECTION VIII. PARTNERSHIP

The cases considered in this section relate to arrangements of a humble nature ; two people have simply put their stock of goods together to be managed for their common profit. The control of the property may have been in the hands of one partner, or of both, but one has kept all the profits and refuses to give the other his rightful share. The arrangement might be confined to one transaction. For example : A and B were taken prisoners in Brittany and lost all their goods. They bought a ship and goods of C, and B remained with C

<sup>1</sup> XV. 116 (Defendant promised to make an estate to R and S, petitioner's daughter, on their marriage ; in consequence of the promise petitioner married his daughter to R) ; XIX. 347-346, *Cases*, pp. 203-204 (Defendant promised to pay J's debts when he married J) ; XXIX. 254 (Defendant in recompense for certain wrongs done to petitioner, promised to pay a certain sum of money for the marriage of E. There is no evidence that petitioner or defendant was related to E).

<sup>2</sup> I use the word without any technical significance.

'in pledge' for himself and A, while A returned to England to sell the goods. It was agreed that A should come back to Brittany and pay C with the money received from the sale of the goods, the residue after that payment to be divided between A and B. There remained £17, but A refused to give B his share; consequently B asked for a subpoena against A.<sup>1</sup>

The example given is not, speaking strictly, a true case of partnership; for partnership implies a relation between persons carrying on a *business* in common with a view of profit.<sup>2</sup> It does, however, raise the same kind of question which is presented in the following petitions :

A was 'partyng felawe in biyng and sell yng in certeyn marchaundyse' with B. They both sold certain cloth to C, who was bound therefor in an obligation, which was delivered to B. By virtue of possession of the obligation, B received £10, but refused to give A his share, 'as right and consciens requireth'.<sup>3</sup>

A and B were pedlars and had their goods together for some six years. B has kept all the increase, and A cannot get any part thereof by common law, 'where by their covenaut he shuld have the half'.<sup>4</sup>

A and B 'were possessed iointly' of certain fish which were to be sold 'to their bother use'. B sold the fish, 'and noon accompte' will render to A.<sup>5</sup>

A and B had goods together to be used to their common profit. B, contrary to 'reason and conscience', converted the goods to his own use. B refuses to give A his share (a half of the profit, &c.).<sup>6</sup>

These examples are sufficient without more to show the kind of case which came before the chancellor.<sup>7</sup> Petitioners

<sup>1</sup> XI. 506; see also IX. 39 (A and B agreed that B should buy wood to their common use, A paying a part of the price. B sold the wood to C, and refused to give A his share of the proceeds).

<sup>2</sup> Cf. the definition in the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 1 (1).

<sup>3</sup> XXIX. 516.

<sup>4</sup> IX. 382, *Cases*, p. 182.

<sup>5</sup> XIX. 26, *Cases*, p. 199.

<sup>6</sup> XXVIII. 378.

<sup>7</sup> For other examples, see VII. 186 (Ship owned by A and B, but under B's management; B sold the ship and will not give A his share of the proceeds); IX. 131 (An agreement to share profits); XXVII. 84 (Ship owned by A and B; A had the management of the ship and kept all the profits. B seeks to recover his share).

usually rest content with asserting that the goods were held in common, to be employed to the use of both parties, without alleging any express promise on the part of the defendant to pay over the just share. The question, then, is not one between the partners and third parties, but rather one of accounting between themselves. No action at law met this situation. One partner could not charge the other as factor or receiver, for obviously there was no such relationship.<sup>1</sup> He could not bring Debt, for he could not claim a share of the profits as his sole property; moreover, a difficulty of pleading stood in the way. One partner could not sue another at law in a matter involving the partnership business. It was this gap in the common law which was supplied by the chancellor's intervention. The law could handle adequately matters arising from dealings between partners and third parties; but in questions which arose between themselves, chancery assumed in the fifteenth century a jurisdiction which it retained till modern times.

The principle upon which equity acted is simple and plain. The property was held jointly; even without an express agreement the situation of the parties conferred upon each a right to a share of the profits. This right equity enforced.

#### SECTION IX. AGENCY

The contract of Agency as we see it in the Year Books is very rudimentary. By deed, one might appoint another to do many acts in his name; but it is in informal agency, which existed without speciality, that we are primarily interested. Any such contract by an agent must find enforcement, if at all, in the action of Debt; in consequence, it was limited by the requirements of *quid pro quo*. Thus in all cases of sale to an agent, it was necessary to show that the goods sold went to the benefit of the principal. We read that an abbot is chargeable on the deed of his monk made for goods furnished, which went to the use of the convent; but it is to be noted

<sup>1</sup> Pollock, Contracts (7th ed.), 140 (citing F.N.B. 117 D), says one partner might bring Account against another. But the principle upon which this was allowed is not stated, nor are any cases cited.

that he is not charged as for the act of his agent. Unless it be shown that he obtained the benefit, Debt would not lie; and this means that the contract was unenforceable. Of the undisclosed principal or the doctrine of ratification we read nothing.

The chancery material does not present many petitions directly concerned with Agency, but we find that the contract received wider recognition than at law. If goods were sold to an agent, and went to the use and profit of the principal, the principal was chargeable.<sup>1</sup> But the chancellor went further than this. If one held out another as his agent, and he were generally so known, then the principal was bound to pay for goods or money furnished to the agent for his use. That is, the goods must be supplied to the agent for his principal, but it was not necessary to prove that the goods actually were received by the principal. Thus:

Petitioner at 'Brugges' delivered £100 to M, 'factour and attorney verly knowyn un to John Warde, . . . to the use of his seid Maister, to be repaied agen at London'. M. made out a bill 'signed with his Masteres Mark', witnessing the loan 'after the cours of Merchaundice'. Warde, however, refused to pay; petitioner alleges that this is 'contrarie to the Cours of trewe Marchaundice' and prays for a remedy.<sup>2</sup>

This is a definite step in advance. M was held out as an agent; he was engaged in commercial transactions for his principal, and consequently from that fact the principal became liable. Moreover, we note the stress which is laid upon the phrase 'the cours of Marchaundice'. The whole fabric of commercial dealings rested upon the validity of such arrangements; and it was the chancellor rather than the judges who gave recognition to the claims of the 'lex mercatoria'.

<sup>1</sup> VII. 112, *Cases*, p. 14. Probably this case is in equity because the facts are so in dispute. Note that petitioner asks for a subpoena against the agent as well as the principal.

<sup>2</sup> XXVIII. 210, *Cases*, p. 178; XXIX. 317 (Goods were sold to Thomas Savage 'in the name of Roger Chedwyk . . . the same Thomas at that tyme beyng Factour and attourney to the same Roger . . . whiche Thomas occupied at that tyme all feates of marchaundises at Andewarp . . . as Factour and Attourney of the seid Roger, And so he there was taken and reputed . . .' Roger refused to pay, and the vendor appeals to equity).

But this is not all. One petition, at least, shows a recognition of the rights of an undisclosed principal. A's servant bought goods of B, using A's money. The servant died, and B refused to deliver the goods to A. A came to equity and prayed for a subpoena against B, alleging that the servant had acted in his behalf and made the purchase with his money.<sup>1</sup> It does not appear that B knew he was dealing indirectly with A. The undisclosed principal was unprotected at law till much later.<sup>2</sup> It is surely interesting that he seeks to obtain relief in equity at an earlier period.

Again, there is recognition of the obligation of the principal on a broader ground. A principal could be bound by the act of his agent, though the authority were given by parol,<sup>3</sup> and though that authority were given subsequent to the act. There is what appears to be a clear case of ratification. A son made an obligation assuming to bind his father. Whether or no he had authority at the time of making the obligation is not certain, but afterwards the father acknowledged and expressly sanctioned the son's act. The chancellor decreed that he should be held.<sup>4</sup>

#### SECTION X. GUARANTEE (SURETYSHIP) AND INDEMNITY

The petitions which we are to consider under this heading do not present such nice questions of discrimination between guarantee and indemnity as later arose in connexion with the construction of the fourth section of the Statute of Frauds.<sup>5</sup> The facts are simple, and the classification is not perplexing. Briefly stated, a contract of guarantee or suretyship implies a relation between three parties; the creditor can fall back

<sup>1</sup> VII. 201.

<sup>2</sup> See Holmes, *History of Agency*, Anglo-Am. iii. 392, citing *Scrimshire v. Alderton*, 2 Strange 1182.

<sup>3</sup> See XLIV. 163 (Relief on a 'promise to save harmless', made by an agent for his principal).

<sup>4</sup> XXIX. 13-4, *Cases*, pp. 214-19. There were other facts in the case, as will appear later in the discussion. The 'bill' made by the son was merely in proof of the furnishing of goods; but it was allowed as a set-off against the father. The son expressly says he acted throughout as agent (XXIX. No. 9).

<sup>5</sup> e.g. *Sutton v. Grey* [1894] 1 Q. B. 285; 63 L. J. (Q. B.) 633.

upon the promisor only in case the principal debtor makes default. In other words, the promisor's liability is contingent and secondary. An indemnity, on the other hand, is a promise to save another harmless from any liability through a transaction into which he enters at the request of the promisor.<sup>1</sup>

Neither guarantee nor indemnity were valid by parol at common law in the fifteenth century. Though there is evidence that a contract of suretyship might have been established without a writing in the Norman period,<sup>2</sup> it became settled by the reign of Edward III that a deed was necessary.<sup>3</sup> Indeed, it appears from an interesting case in the Eyre of Kent that resort was had to the clumsy method of making the surety a principal debtor by affixing his seal to the bond.<sup>4</sup> Certainly this would not have been attempted, had it been possible to charge him without writing. The common law therefore appears to have repudiated any nice distinction between primary and secondary liability. At all events, the parol contract of guarantee was not recognized till the time of Henry VIII.<sup>5</sup> Nor was indemnity a valid parol contract during our period.

We turn, therefore, with some interest to the petitions in equity. Those involving indemnity are quite numerous; I can present but a few relating to suretyship.<sup>6</sup>

#### 1. *Contract of Suretyship or Guarantee.*

1443-1450.<sup>7</sup> One Lawrence Walker bought cloth of petitioner for £8, 'for whiche payment as woll and trewely to be made . . . (defendant) . . . undurtoke and bykome borowe for the seide Lawrence, in as muche as the seide supliant nold nothur have

<sup>1</sup> Anson, *Contracts* (11th ed.), 74.

<sup>2</sup> See Holmes, *Common Law*, 260, citing Glanv. x, c. 5.

<sup>3</sup> Y. B. 44 Ed. III 21-3 (cited Holmes, *Common Law*, 264, n. 4).

<sup>4</sup> *Bokeland v. Leanore*, Y. B. 6 & 7 Ed. II. [S.S.] 9.

<sup>5</sup> Y. B. B. 12 H. VIII, Mich. pl. 3; 27 H. VIII, Mich. pl. 3 (cited Holdsworth, iii. 342, n. 4).

<sup>6</sup> This is not to be understood to mean that there were very few such petitions; rather that in the limited time at my disposal I was only able to transcribe a few.

<sup>7</sup> XIV. 5, *Cases*, p. 188. Certain phrases in the petition seem to indicate that the defendant was primarily liable; if that were so, this would not be a case of suretyship. However, reading the pleading as a whole, I interpret it as a contract of guarantee.

sold nor delyverode the seide clothe unto the seide Lawrence butt only uppon trust of the seide . . . ' (defendant). £3 remained unpaid. The debtor has gone to 'strange places unknowen', and petitioner, having no remedy against the defendant at common law, comes to the chancellor and prays to 'have dewe remedy'.

c. 1475.<sup>1</sup> Petitioner sold kerseys to Thomas Ashley for £10; and for security of payment 'Thomas Goselyn at the time of the makynge of the said bargayn was and became suerte . . . (to petitioner) . . . and then graunted and promittid to the same William (petitioner) that if the seid Thomas Asshley paid not to hym the seid x li . . . that then the seid Thomas Gosselyn wold pay . . .' Petitioner is particular to state that he sold the kerseys trusting to Gosselyn's promise. Ashley paid £5 and then went to 'places unknowen', and Gosselyn refused to pay. Petitioner prays for a subpoena against Gosselyn. Gosselyn in his answer<sup>2</sup> sets up other facts, tending to show that the original debt is discharged.

We cannot draw strong inferences from two petitions. Two facts, however, should be noted. The creditor alleges in each case that he extended credit only upon the strength of the defendant's promise. Again, that promise was an important part of the original transaction. We observe, furthermore, that the petitioner has exhausted his remedies against the principal debtor before he turns to the surety. This seems to be of importance; for sureties did appeal to the chancellor because the creditor is seeking to hold them, when the principal debtors are able to pay,<sup>3</sup> or before the principal debt is due.<sup>4</sup> The remedy sought was a Certiorari. I believe that a parol contract of suretyship was recognized and enforced in equity, at least where the creditor could show that the defendant's promise was the inducement to the extension of credit to the principal debtor. On the other hand, equity was jealous of the surety's rights; his liability was strictly secondary, and he might use any defences open to the principal

<sup>1</sup> LIX. 140.

<sup>2</sup> LIX. 141. He also alleges that he became surety to petitioner only on condition that Ashley should find security that he should be saved harmless.

<sup>3</sup> XXIX. 462 (The surety was a joint obligor with the principal debtor. The creditor brought suit on the obligation at common law).

<sup>4</sup> LIX. 61.

debtor.<sup>1</sup> These promises were gratuitous. We note this in passing, but reserve it for later consideration.

## 2. *Indemnity.*

This represents a common arrangement. A desires a loan of money from B. B, however, is unwilling to give credit to A alone; in consequence, A goes to his friend C, and induces C to become jointly bound with him to B, at the same time promising to save C harmless as against B.<sup>2</sup> Or under similar circumstances C might become bound separately to B.<sup>3</sup> There are two distinctive features common to all these cases; C has become bound to B, not for his own duty but for A's; he became bound at A's instance, and relying upon A's parol promise to save him harmless.<sup>4</sup> This parol promise received no recognition at common law. I believe, for reasons that will be stated presently, that it was enforced in equity.

In the example above given, the promise to save harmless was express. But it need not necessarily have been so. Indeed, one petitioner, though he became bound at the defendant's instance and on the faith of his promise, puts his claim to a remedy on a broader ground; for he asks the chancellor to consider 'how that reson and good conscience wold that, sith your seid besecher was *for and by* the seid Thomas Oldebury (the defendant and promisor) *put in charge*, that the same Thomas should him *discharge*'.<sup>5</sup> In other words, requesting one to become bound in your behalf for your duty raises an implied promise to discharge him. And so we find petitioners relying upon the situation of the parties as their ground for equitable relief; the defendant may have promised expressly to protect them, but they do not allege any promise in the petition. The following extract from

<sup>1</sup> This I infer from LIX. 141, p. 134, note 2. And see XXXI. 82, *Cases*, p. 96.

<sup>2</sup> X. 207, *Cases*, p. 184; X. 242; XIX. 224.

<sup>3</sup> XIX. 91; XXXI. 116-17; LIX. 104; LIX. 123.

<sup>4</sup> Petitioners express this in various ways: X. 207, *Cases*, p. 184 ('at Instaunce and prayer of William Brompton . . . And opou ful promise to kepe him harmelesse'); XIX. 91 (Defendant promised 'on his faith and troueth to keep him harmless . . . for any suit or vexacon that should be hadde . . .'); XIX. 224 ('by the steryng request and excitacion . . .').

<sup>5</sup> XIX. 204.

a petition is a fair example. Complainant thinks it sufficient to say that '... where as your said besecher atte request and praier of on Thomas Mauleson was bound in on obligacyon of xvj li. iij s. x d. to on John Throkmorton, Esquier, and for defaute of nounpayment of the seid soum the said John sued your said beseecher ... and now your said besecher hath content the party ... and non parcell of the said soum his dute but dute of the said Thomas ...'<sup>1</sup>

Whether the promise were express or implied the defendant has received a substantial benefit. But we may go further; the promisor will be made to fulfil his promise even though it is gratuitous. If he induces one upon the strength of his promise to become bound for the duty of *another*, the chancellor will require him to fulfil his promise. This comes out in an interesting case, which is endorsed with judgement:

X sold certain goods to Y for £240. Complainants at the 'speciall instance and praier' of Z became bound to X for the duty of Y. Z promised that they should be saved harmless. Z died; X has taken an action on the obligation against complainants, and they are like to have to pay the sum. They therefore appeal to the chancellor and ask that defendants (Z's executors) may be compelled to protect them against X. Defendants in their answer<sup>2</sup> asserted that this was not a proper case for relief; they then proceeded to deny the facts alleged in the petition. The chancellor, however, after 'good and ripe deliberation', ordered that the defendants should 'acquit and discharge' the petitioners against X for the sum, as alleged in the petition.<sup>3</sup>

<sup>1</sup> XVI. 440. In the following cases the petitioners allege that they became bound at the defendant's request, but no express promise to save harmless is set out: X. 186; X. 242; XV. 237.

<sup>2</sup> XLIV. 143, *Cases*, p. 224.

<sup>3</sup> XLIV. 142, *Cases*, p. 222. XLIV. 263 is a parallel case, but the petition is not endorsed. The defendant, late Prior of B., 'sent his owne servaunte ... unto your seyd Oratours that they wull do at the Instance of the same late priour so myche to be seurte and undertake for on William Ecford ... unto John Ellys of London, Mercer, for the some of [£5 13s. 4d.] and the same late priour grauntid be the same servaunt and messenger ... to save them harmeles for the seyd some in peyne of xl li ...' Petitioners became bound as sureties and had to pay the debt, after which they sent to the defendant 'for to content us (i. e. petitioners) acordyng to his promys and he denyth and bed us shewe owre specialte, and so we ar w<sup>t</sup> owte Remady at the comon lawe of ony accion a yenst the same late priour for to be taken, wyth owte your gracious lordschip ...' Petitioners pray for

There can be no doubt about the decision in this case. And reasoning back from this, we have strong reason to believe that relief was granted in the other cases. For if the chancellor held that one must fulfil his promise, where he thereby induced another to become bound for the duty of a third party, *a fortiori* he would hold him to his promise where the duty was his own. It is submitted with confidence that the contract of indemnity received clear recognition in chancery in the fifteenth century.

As the promise was to save the petitioner harmless, it became broken the moment suit was threatened or begun against the promisee. Payment of the obligation was not a condition precedent to bringing the subpoena. In consequence, the relief sought varies with the circumstances. Where the petitioner has been compelled to pay, he demands repayment of the sum,<sup>1</sup> and even of the costs sustained in defending a suit.<sup>2</sup> Where he is merely threatened with suit, or in the language of the pleaders, is being 'vexed', he asks that the promisor be compelled to fulfil his promise literally, that is, that protection be afforded.<sup>3</sup> We have seen that the chancellor might so rule.<sup>4</sup>

In conclusion, we may remark that the executors of the promisor were held to be bound by the promise, at least where they had in their hands assets of the deceased.<sup>5</sup>

## SECTION XI. AGREEMENTS OF A GENERAL CHARACTER

The following cases, heterogeneous as they are, are connected by one common trait. The promise is for the performance of a definite act; the breach of the promise, with one or two exceptions, arises through failure to act at all. The agreements are all by parol, and are very informal in

a subpoena against the defendant, and such relief as accords with reason and conscience.

<sup>1</sup> IX. 411 (The obligee 'coarted the said bisecher by processe of lawe to contente him'); X. 242; XIX. 224 (Petitioner has been 'arted to content' the obligee, and now demands repayment from the defendant); XXXI. 116-17 (Petitioner asks that defendant be compelled to pay); LIX. 104.

<sup>2</sup> XVI. 440.

<sup>3</sup> X. 207; XIX. 91; LIX. 123.

<sup>4</sup> XLIV. 142, *Cases*, p. 222.

<sup>5</sup> X. 186; XLIV. 142, *Cases*, p. 222; XLIV. 263; LIX. 104.

nature. None of the petitions is endorsed, and to that extent the evidence is unsatisfactory. But no class of cases better illustrates the wide scope of the chancellor's jurisdiction. An agreement is made to deliver a letter or to transport goods. For lack of formality it does not fall within the narrow range of contracts enforceable by the common law. Yet these contracts must have been very common. The absence of a postal service and of any established system of common carriers compelled the employment of private individuals. Unless these could be held to perform their promises great confusion would result. Herein there was scope for the intervention of equity. I have attempted in a rough way to classify the cases.

### 1. Agreements for Personal Services.

#### (a) *Promise to erect a building.*

The two following petitions recall many of the fifteenth-century cases in *Assumpsit*, where it was sought to charge the promisor for non-performance of his promise.<sup>1</sup> The promisor has not begun the work and left it incomplete; he has done nothing at all. But there is one thing which differentiates these petitions from their counterparts at common law: the absence of any specific undertaking. In the first case it is simply said that an agreement was made; in the other the defendant said that he *would* do a certain thing. To distinguish the latter from an express undertaking may seem captious, but the famous resolution in *Slade's*<sup>2</sup> case should not be forgotten.

The church at K. had fallen into disrepair, and an agreement was made with the defendant 'q'il duist faire l'avaunt dite esglise bien et covenablement estre fait, reedifie . . . et reparaille'. He was to receive 320 marks, of which 280 have been paid; but nothing has been done, and the chancel of the church is in such bad condition that it is like to fall at any moment, to the great damage of the parishioners, the petitioners.

<sup>1</sup> e. g. Y. B. 2 H. IV. 3. 9.

<sup>2</sup> 4 Co. Rep., 92 a. The judges thought it necessary to say specifically that 'when one agrees to pay money or to deliver anything, thereby he assumes to pay or deliver it'.

There is no remedy at law, and the chancellor is asked to grant relief.<sup>1</sup>

O. was in prison for non-payment of damages in an action of Waste, brought by petitioner for the burning of a mill. Defendant came to petitioner and said that if O. were discharged he would rebuild the mill at his own cost. Petitioner discharged O., but defendant has not built the mill, and still refuses to do so, 'contrarie to his seid promyse, good feithe and conciens'. Petitioner asks that he be . . . 'rewled and Jugged as good conciens requyreth'.<sup>2</sup>

It is not perfectly clear whether the relief sought is damages or specific performance. Probably in the case of the church the parishioners were seeking to compel the defendant to fulfil the agreement. Even in modern times equity will decree specific performance of a contract to do work, under certain circumstances.<sup>3</sup> Whichever remedy were granted, relief would be afforded where there was no remedy at law.

(b) *Carriage and Delivery of Goods.*

The absence of any established system of transportation comes out vividly in the following cases. In each, goods have been entrusted to the defendant, to be conveyed to a certain place.

Petitioners are John Lakeham and Alice his wife. Lakeham was in prison in London, and sent to his wife, who was then at home in Sussex, asking her to bring his goods to London so that he might be 'socourid and holpe with his seide godes'. Alice, then, 'for the gret trust . . . that she had in on John Taylour, made covenaut' with him to take the goods to 'Wynchilseye', whence they were to be taken to London by water. Taylour came and took the goods, promising to carry them to the destination, but instead took them to his own house, where they still are. Petitioners are destitute, and come to equity praying that they may 'be restoryd to there seide goodys'.<sup>4</sup>

'Acorde se prist' between petitioner and defendant that defendant should carry certain goods of the petitioner in a ship from London to Colchester. Contrary to the 'acorde' defendant took the ship to a place 'deinz la fraunchise de la

<sup>1</sup> VI. 21, *Cases*, p. 176.

<sup>2</sup> See Maitland, *Equity*, 239-40.

<sup>3</sup> LIX. 114, *Cases*, p. 225.

<sup>4</sup> XII. 84.

count d'oxenford', where the goods were seized 'par les officers le dit count', to the great damage of petitioner. He prays that defendant be made to find surety to recover the goods and take them to Colchester, as agreed.<sup>1</sup>

Petitioner delivered to defendant two horses and certain goods to be delivered to his wife in England. Delivery was never made, to petitioner's damage, for which he asks remedy.<sup>2</sup>

Petitioner 'fretta en la nief le dit John Dekene (defendant) . . . xx ton de frument pur deliverer a burdeaux (Bordeaux)'. Defendant discharged the grain at Plymouth, to the damage of petitioner in 'C li et plus', whereof he prays remedy.<sup>3</sup>

These are cases of misfeasance, and it is notorious that an action lay at law, where there was an undertaking. Why, then, are they in equity? Probably, in the first example, because the petitioner is in prison and in great poverty, which prevented his bringing an action at law. In the second, the relief sought is not damages, but that the defendant should find surety to carry out the accord, that is, in effect, specific performance. In the third, the contract was made out of England,<sup>4</sup> while, in the last case, there was no specific undertaking. The acceptance of goods for transportation seems in equity to have implied a promise to carry them to the intended destination. Such was not the case at law.

(c) *Special Services.*

As examples of what may be called special personal services, I have selected three petitions: A desires to send a letter to B; there is no regular post, and if the letter is to be taken some private person must be employed. C presents himself and promises to take the letter. He makes default.<sup>5</sup> There is no definite misfeasance, such as confronts one in the common law cases. Yet, as damage has ensued to A from

<sup>1</sup> X. 328.

<sup>2</sup> VI. 59. There was a further term in the contract: that defendant might keep the horses if he paid 10 marks. He never made such payment.

<sup>3</sup> XII. 181.

<sup>4</sup> It is alleged that there is no remedy at law, but no reason is assigned.

<sup>5</sup> XV. 52, *Cases*, p. 191. The case is complicated by other facts; namely, that the defendant was in collusion with persons who had received petitioners' goods. However, in the prayer, they seek to charge him for non-delivery of the letter, which seems to be the essential point. The claim for £1000 damages for the loss of goods valued at £500 is certainly strange.

the failure to deliver the letter, there ought to be some remedy. Again, A's servants are imprisoned abroad; A goes to B, and agreement is made that B shall ransom the servants and deliver them out of prison. B receives forty marks, but does nothing. In consequence, the servants suffer, are 'distressez, stokkes et malement tretes', because the ransom is not forthcoming.<sup>1</sup> B, however, is at most guilty of a non-feasance. A would find cold comfort in seeking to charge him in *Assumpsit*.<sup>2</sup> In these two cases it is quite clear that there is no remedy at law. The third case is not quite so clear. A 'withheld with our sovereigne lorde þe kynge' one B to do service on the sea. B received his wages from A, but nevertheless deserted, which put A to 'right grete and notable Cost and losse of his gudes'. It is not perfectly obvious why A did not have an adequate remedy at common law.<sup>3</sup>

## 2. Agreements for the Compromise of Claims, &c.

Under this general heading I have put cases in which the parties made some arrangement with regard to a suit, or submitted themselves to an award.

### (1) Cases of 'award'.

#### (a) Promise to 'stand by' an award:

A and B are in dispute as to their respective rights in certain lands. They are about to go to law, when 'by mediacon of frundis' the parties agree to stand by the award of certain arbitrators. The award is made: A carries out his part, or stands ready so to do, but B refuses. The common law, of course, afforded no means of compulsion, but A can present a strong case in equity.<sup>4</sup>

#### (b) Promise of arbitrators to make an award in a particular way:

Certain matters were in dispute between A and B, who agreed to submit to the award of defendants. Defendants

<sup>1</sup> XII. 201, *Cases*, p. 188.

<sup>2</sup> i.e. in the fifteenth century.

<sup>3</sup> XVI. 285 (1442). It may be that, as the cause of action was for desertion, the king would be regarded as interested. That would explain the presence of the case before the chancellor.

<sup>4</sup> X. 264 (Petitioner stands ready to perform his part, and has paid certain money to defendant); XV. 181 a-181 c, *Cases*, pp. 195-7 (Defendant in his answer says that the matter alleged is not sufficient to put him to answer; petitioner replies that it is).

made promise to A 'apon their feith, trowth and honeste that if they made ony awarde betwyxt the seid parties . . . that they should delyver the same awards in Wrytyng' to each of the parties. A, giving 'full feithe And credence' to this promise, became bound to submit to the award. The award was made, but not in writing; and A and B fell into dispute as to its terms, whereupon A requested defendants to commit the award to writing at his cost 'according to their promise', but defendants refused. A prayed for a subpoena and asked that defendants might be compelled 'to delyver the seide awarde in Wrytynge . . . accordyng to their seid promyse or else to make certayn reporte therof afore the Kyng in his Chauncerye ther to be entrid of Recorde'.<sup>1</sup>

The defendant's promise was gratuitous, but it was the inducement which led to A's changing his position. Moreover, great damage will ensue to A if the promise be not fulfilled, because of the dispute about the terms of the award.

(2) *Agreements concerning litigation.*

A and B made an agreement that A should bring trespass against B, and that B should appear in person or by attorney, and plead as the counsel of A should wish; and after judgement A should release damages to B. The purpose of this fictitious suit is not clear. A brought the action, B appeared and pleaded as was desired, with the result that A obtained judgement for £40. Afterwards A refused to release the £40 contrary to the agreement and 'encountre bon foie et conciens'. B prays for relief.<sup>2</sup>

A had brought an action of trespass against B, for whom C became surety. A promised B to 'take respyte and sparynge of the callyng uppon the said action', till B had gone abroad and returned. B went away, and now A, contrary to his promise, 'calleth uppon the said accion,' and intends to obtain judgement by default. C, the surety, appeals to the chancellor and prays relief.<sup>3</sup>

(3) *Performance of a specific act, in general.*

This heading is not very happily chosen, but it may serve to introduce certain cases not easily classified. The defendant has promised expressly or by implication to do a certain thing for the petitioner, and has refused subsequently to do it.

<sup>1</sup> XXXI. 118.

<sup>2</sup> X. 163.

<sup>3</sup> XXXI. 82, *Cases*, p. 219.

A gave all his 'goodys and catelle' to B, to the intent that B should furnish him with 'mete and drynke and cloth' during his life. B took possession of the goods, but refuses to supply A with meat and drink 'agens all good feith and concyense'.<sup>1</sup> Again, A induced B to resign his prebend, promising to make him sure of a pension of the value of the said prebend; B resigned, and A refused to fulfil his promise.<sup>2</sup>

Agreement is made to procure a release on the payment of 26s.; the money is paid, but the release is not forthcoming.<sup>3</sup> A agreed to surrender a patent (Rangership of the New Forest) so that B might obtain the same, if B would pay him £20; B paid the money, A refused to surrender the patent.<sup>4</sup> 'Covenant and accord' was made between A and B that A should surrender 'la garde de Stanke de Fosse deinz le Counte D'everwyk', so that B might obtain the same, in return for which B should make A sure of an annual pension for life. B stood ready to perform his part, but A would not give up the 'garde'.<sup>5</sup>

In these cases we have the promise of the performance of an act in return for money paid, goods delivered, or some act performed or to be performed. None of the promises are gratuitous; there is clearly a consideration, but again, as the defendant has refused to act at all, as the contract is to that extent executory, the disappointed petitioner is remediless at common law.

<sup>1</sup> IX. 162 (1438).

<sup>4</sup> LIX. 10.

<sup>2</sup> XII. 197.

<sup>3</sup> XXXI. 374, *Cases*, p. 220.

<sup>5</sup> X. 276.

## CHAPTER III

### PROCEDURE AND PROOF

IN considering the chancery procedure and method of proof I shall be as brief as possible. Both subjects have been considered at length elsewhere,<sup>1</sup> and in this connexion I wish only to introduce some statements from the petitions and Year Books.

#### *I. Procedure.*

The proceedings began by the bill or petition which was addressed to the particular chancellor who happened to hold the office, thus: 'A tres reverent piere en dieu et mon tres gracious Segnur, L'erchevesque d'everwyk et Chaunceller D'englitere.'<sup>2</sup> This title is written at the top of the petition, and in a rather large hand. Usually, the petitioner identifies the chancellor whom he is addressing by describing him as the Bishop of York or Canterbury, &c., as the case may be; this furnishes, generally speaking, the only means of determining the date of the petition. Where a chancellorship extended over a long period, or where a Bishop of the same diocese was chancellor at widely separated times, the problem of settling the period in which the particular petition falls becomes very difficult. For example, Thomas de Arundel, Archbishop of Canterbury, was chancellor in 1399; John Stafford,<sup>3</sup> Archbishop of Canterbury, was chancellor from 1443 to 1450. Now if a petition is simply addressed to the 'Archbishop of Canterbury', it may be very difficult to determine which Archbishop is meant, unless there chances to be some statement in the petition which in itself fixes

<sup>1</sup> e.g. Spence, *Equit. Jurisdict. of the Court of Chancery*; Kerly, *History of Equity* (Yorke Prize Essay, 1889).

<sup>2</sup> VII. 250, *Cases*, p. 179.

<sup>3</sup> John Stafford was chancellor from 1432 to 1450, but during the first eleven years he was Bishop of Bath and Wells.

a date.<sup>1</sup> Again, there are petitions addressed to the 'Chancellor of England' without any further description.<sup>2</sup>

The petitions are very much alike in form. They consist often of only one long and involved sentence which recites informally the wrong complained of, and concludes with a prayer for relief. Great particularity of statement was not required; 'en cest court', remarked a chancellor, 'il n'est requisite que le bille soit tout en certain solonque le solemnity del comon ley, car icy il n'est forsque petition, etc.'<sup>3</sup> The demand for relief is commonly in general terms, but it almost always comprises a request that the chancellor cause the defendant to come into chancery and be examined upon the matter alleged in the petition. The petitioner usually asserts in this connexion that he is without remedy at law. The following example is typical: 'Que please a vostre tres reverent paternite et gracios Seignurie, graunter brief direct al dit Mark (defendant) pur apparere devant vous a certain jour sur peyn par vous alymyter, d'estre examine de les matiere suisditz et sur son examinacion luy ensy iustifier et govourner que le dit Suppliant purra aver ceo qe reson et bon concience demaundent en celle partie, Considerant tres gracios Seignur que le dit Suppliant ne poet mye aver remedie en ceo cas a la comune ley, et ceo pur dieu et en œvre de charite.'<sup>4</sup> At the end of the petition are usually placed the names of the persons who stand as pledges (*plegii de prosequendo*) for the petitioner. This was occasioned by a statute of Henry VI,<sup>5</sup> which decreed that no writ of subpoena should issue until the petitioner had found sureties to satisfy the defendant for his damages in case the allegations made in the petition were not proven.

The Subpoena was the writ usually asked for, though we do find requests for a Certiorari or Corpus cum causa when it was desired to remove a suit from the common law courts, or to obtain relief from a judgement. In response to the writ the defendant appeared. At first he appears to have been examined at once orally; but at length the practice arose of

<sup>1</sup> Wherever petitions are endorsed, the date can usually be fixed from the endorsement.

<sup>2</sup> e. g. Bundles LXVIII-LXXV.

<sup>3</sup> IV. 100, *Cases*, p. 173.

<sup>4</sup> Y. B. 9 Ed. IV. 41. 26.

<sup>5</sup> St. 15 H. VI. c. 4.

putting in an answer in writing. The answer commonly begins by a protestation against the sufficiency of the bill, which is followed by a traverse of the chief allegations in the petition, and the defendant's statement of his own case. To the answer the petitioner might reply by replication, to which in turn the defendant might put in a rejoinder.<sup>1</sup> I do not know of any case in the Early Chancery Proceedings in which there are more than four pleadings, but there was nothing to prevent the parties from proceeding further.<sup>2</sup>

After examining the pleadings and hearing the evidence introduced by the parties the chancellor pronounced his decree. Probably this decree was made verbally, and in most cases no record was made of it. Chancery was not a court of record. In one case a chancellor said that it was customary in chancery to grant a certain kind of relief, 'car nous trovoms recorde en le chancery de tiels';<sup>3</sup> again, the cancellation of an obligation is ordered to be 'inrolled on the record in chancery'<sup>4</sup> (*in Cancellaria . . . de recordo irrotulari faciat*). I do not know what these statements mean, unless they refer to the endorsements on petitions. Of a record as such there was none; and, as has already been remarked, the endorsements are few and far between.

It is needless to say anything further of the kind of relief granted. That will be apparent from what has been said in the preceding chapter. Chancery of course acted *in personam*; the only relief it could grant took the form of an order to the defendant. The court could not nullify a bond; it might enjoin a defendant from bringing suit upon an obligation, but if he chose to be obstinate, it could do nothing except imprison him. The common law judges resented the use of the injunction, and in one memorable case they actually advised a plaintiff in an action at law to proceed to judgement in defiance of the chancellor's order, saying that if he should be imprisoned in the Fleet they would release him by writ of

<sup>1</sup> e. g. XIX. 59-56, *Cases*, pp. 199-203.

<sup>2</sup> In the case of *Hals et al. v. Hynckley*, the pleadings continued to a surrejoinder. Pike, *Common Law and Conscience* . . ., L. Q. R., i. 443.

<sup>3</sup> Y. B. 22 Ed. IV. 6. 18.

<sup>4</sup> XXIX. 13, *Cases*, p. 214.

*Habeas corpus*.<sup>1</sup> This is a threat which, so far as I know, was never carried out; in general, the intervention of chancery seems to have been successful.

## II. *Proof*.

In the petition the complainant frequently offers to testify himself, or to introduce evidence in his own behalf, even going so far as to offer to prove his statements 'as this court will award'.<sup>2</sup> Payment is alleged in the presence of witnesses,<sup>3</sup> or it is said that it was made 'come certainment par recorder des gentz dignes de foi et as quelx foi est done, devant vous sera monstre'.<sup>4</sup> Another complainant avers that his statements are true 'os the ful reverent fader in god, the bishop of Lincoln, in whos presence this covenaut and acorde was made, wole recorde'.<sup>5</sup> In short, he takes pains to state that he has abundant evidence of the truth of his statements.<sup>6</sup>

In the matter of proof, a petitioner in chancery had one conspicuous advantage over a plaintiff at common law. This lay in the examination of the defendant under oath. We have noted that the petitions uniformly ask for an examination of the defendant, and it is common to find it alleged that the defendant has already admitted the case against him. Thus it is said that the defendant 'a fore worthy men hath knowledged the dewete and payment to be made to youre seyde suppliant',<sup>7</sup> or that 'þe seid John Loget (defendant) before notable persones hath knowledged þe seid x pound to be

<sup>1</sup> Y. B. 22 Ed. IV. 37. 21.

<sup>2</sup> XIX. 57, *Cases*, p. 202.

<sup>4</sup> VI. 161.

<sup>3</sup> XIX. 123.

<sup>5</sup> XXXIX. 55, *Cases*, p. 221.

<sup>6</sup> VII. 79 ('Si come mesme le suppliant par pluys notables et sufficient homes de le dit parochie loialment purra prover'); XVI. 334 ('Accorde of mariage was taken and appoynted . . . in recorde and wittenesse of many thyrfty gentilmen'); XIX. 345, *Cases*, p. 204 ('Heruppon my wife and I will swere uppon the sacrement that this is true that we swere and herupon will bring . . . (six parties named) . . . and xx<sup>ii</sup> good men mo to conferme this true that my wife and I will swere'); XXVIII. 210, *Cases*, p. 212 (Petitioner has a bill of a debt, 'testifying the same after the cours of Marchaundice'); LIX. 212 (Petitioner alleges the defendant admits he owes money, 'as he hath many times confessed and seid unto divers persones which can and wol testifye the same'). In Y. B. 22 Ed. IV. 6. 18, reference is made to *two* witnesses against a matter of record. I do not think there is any significance in the number.

<sup>7</sup> XI. 47, *Cases*, p. 186.

dewe . . . as it is above seid'.<sup>1</sup> Petitioners even ask that the defendants be examined 'et solonc lour respounse a doner iugement solonc ceo que loialte, foy et conscience demaundent',<sup>2</sup> and there is record of a decree which was based primarily upon admissions made by the defendants in the course of their examination.<sup>3</sup> In this the chancery had a powerful method for discovering the truth.

Perhaps the method of proof in chancery can be best seen from one illustrative case. The facts were extremely complicated, and as the case has already been considered<sup>4</sup> I shall not restate them. The defendant, in his answer,<sup>5</sup> traversed all the material allegations in the petition, and these were reaffirmed by the petitioner in his replication.<sup>6</sup> Both parties stated that they were ready to prove their statements as the court should award. Then follows a series of depositions: the deposition of John Powele and John Glasse, 'made in the presence of my lord Chaunceler at the More . . . by their othes upon a boke';<sup>7</sup> 'the deposition of William Nynge'<sup>8</sup> ('The seid William Nynge, sworn and dywely examyned before my lord Chaunceler in the playn Court of Chauncery'); the deposition of William Aphowell, 'afore the Maister of the rollez';<sup>9</sup> the deposition of Stephen Stychemerssh the yonger, 'made before George, Archebisshopp of Yorke, primat and Chaunceller of Englund';<sup>10</sup> the deposition of William Elyot, petitioner, in support of his own petition;<sup>11</sup> the deposition of Robert Talbot;<sup>12</sup> the declaration of Stychemerssh the elder (defendant), in support of his answer.<sup>13</sup> The decree<sup>14</sup> runs: 'Memorandum quod pro eo quod, ista peticione ac responsione ad eandem facta et replicatione in hac parte habita, necnon desposicionibus et testimoniis tam ex parte . . . (of petitioner) . . . quam ex parte . . . (of defendant) . . . in premissis coram domino Rege in Cancellaria sua factis et habitis, lectis et auditis, ac materia in eisdem plenius intellectis (*sic*), visum

<sup>1</sup> X. 76.<sup>2</sup> LIX. 285, *Cases*, p. 232.<sup>3</sup> XXIX. 12, *Cases*, p. 216.<sup>4</sup> XXIX. 11, *Cases*, p. 218.<sup>5</sup> XXIX. 8, *Cases*, p. 218.<sup>6</sup> XXIX. 6, *Cases*, p. 219.<sup>7</sup> XXIX. 4, *Cases*, p. 219.<sup>8</sup> LXVIII. 49.<sup>9</sup> *Supra*, p. 132.<sup>10</sup> XXIX. 10, *Cases*, p. 217.<sup>11</sup> XXIX. 9, *Cases*, p. 218.<sup>12</sup> XXIX. 7, *Cases*, p. 218.<sup>13</sup> XXIX. 5, *Cases*, p. 219.<sup>14</sup> XXIX. 13, *Cases*, p. 214.

est Curie Cancellarie predictæ . . . ' that the petitioner had proved the allegations in his petition, &c.; an order was made accordingly.

From this case and others<sup>1</sup> we gain some insight into the method of examination in chancery. The party or witness appeared 'in his proper person' in the chancery, and was examined before the chancellor or the Master of the Rolls, or some person properly qualified. The examination was under oath; it is sometimes said to be on the sacrament,<sup>2</sup> sometimes 'on a boke'.<sup>3</sup> If the defendants lived at some distance from London, or were ill and unable to appear, a commission by a writ of *Dedimus potestatem*<sup>4</sup> would be granted to take the defendant's answer and also to examine witnesses. A certificate of the answer and testimony would then be taken into chancery.

The care which the chancellor exercised in ascertaining the true state of a case is evident from such documents as these. Evidence verbal or written was placed on the same footing, but the chancellor compelled a petitioner to prove his case. If he deemed the evidence insufficient or conflicting, he would call for more,<sup>5</sup> and no decree could be had until it was produced. There do not appear to have been any rules of evidence nor presumptions as to the burden of proof. The whole proceeding was thoroughly informal.<sup>6</sup>

<sup>1</sup> e. g. XIX. 354 d-354 e, *Cases*, pp. 206-207.

<sup>2</sup> XIX. 345, *Cases*, p. 204.

<sup>3</sup> XIX. 354 d, *Cases*, p. 206 (Examination of David Gogh).

<sup>4</sup> 10 S. S. xxvii-xxviii; and see XXV. 111. 110 (10 S. S. 141-2).

<sup>5</sup> Y. B. 16 Ed. IV. 9. 10.

<sup>6</sup> I have omitted consideration of those cases in which an issue of fact was tried in the common law courts.

## CHAPTER IV

### THE THEORY OF CONTRACT IN CHANCERY

IN the fragmentary view of the jurisdiction of equity which is presented in the preceding chapters we have noticed very summarily some of the principles which underlay the intervention of the chancellor. It now becomes necessary to gather these together and present them as a whole. Such a task one must approach with great diffidence, and with the consciousness that the danger of error is very great. In the first place, the extent of the equitable jurisdiction in contract is a matter of considerable uncertainty. Few of the petitions are endorsed with judgement. In the majority of cases, it has been necessary to fall back on inference and to sketch probabilities. But secondly, even if one knew precisely what the chancellor did, it would still be difficult to determine the principles on which he acted. Herein the student of the common law has a conspicuous advantage. The Year Books give not alone the decision of a case, but the discussion and arguments which preceded it. The contentions of counsel, the pointed interjections of the judges and the comments of the reporters are excellent material out of which to frame a theory.

In equity, unhappily, it is otherwise. Beyond an occasional case involving a subpoena which has crept into the Year Books, we have no reports; there are only the bare pleadings which came before the chancellor. These are drawn often by petitioners unskilled in legal technicalities and forms; for in many cases the litigant drafted his own petition. Equity gave judgement '*secundum conscientiam et non secundum allegata*',<sup>1</sup> a fact which doubtless accounts for the looseness of phrasing and ungainly diffuseness of many complaints. The facts are often presented carelessly, the demand for relief is

<sup>1</sup> Remark of the chancellor in Y. B. 9 Ed. IV. 14. 9.

vague, and even where a petition is endorsed there is slight indication of the process of reasoning which leads to the decision. Confessedly, any theory which can be put forward must be built up of fragments ; it cannot go beyond the inherent limitations of the material.

#### Absence of Remedy at Law.

The primary limitation imposed on the use of the subpoena lay in the fact that it could be brought only in case the petitioner could show an absence of remedy at law.<sup>1</sup> The burden of establishing this fact lay upon the petitioner ; if he failed to make out such a case the bill must be dismissed. Such, at all events, was the theory. However, the chancellor did not interpret this limitation strictly ; he recognized a variety of circumstances which might produce a failure of legal remedy, and if the constant complaint of serjeants and judges is any criterion, we may assume that in spite of this limitation he found means of invading what was regarded as the peculiar domain of the common law. It becomes important, therefore, to observe in what, as a matter of practice, absence of remedy at law consisted.

1. First and foremost are the cases which did not fall within the class of any contracts recognized by the common law. Such, for example, were parol agreements which lay outside the scope of Debt ; in fact, these include all the informal agreements which were later protected by Assumpsit, and some others besides.

2. Cases in which the technicalities of procedure or proof prevented a remedy being given in a particular case. Of these we may instance as examples, suits by one partner or executor<sup>2</sup> against another ; suits to recover debts proven

<sup>1</sup> Y. B. 39 H. VI. 26, 38 (per Jenney) : ' cest action de Subpaena ciens ne gist mes ou il n'y ad aucun remedy a le Comone Ley : donque il suera en cest Court de conscience '. This does not apply to petitions brought by the king, or by officers of the chancery.

<sup>2</sup> Cf. X. 151 (Petitioner and defendant were both appointed executors by the will of the testator. The defendant was in possession of an obligation which belonged to the testator, and though he refused to take part in the administration of the estate he would not give up the obligation. In consequence, the petitioner could not recover the debt due to the estate, nor

by sealed instruments which have been lost or destroyed ; suits by the assignee of a chose in action.

3. Cases in which the inequality of the parties, or the failure of common law process, resulted in the practical denial of a remedy.

4. Cases in which a remedy was given at law, but it was insufficient.

This is exemplified by the suits to recover specific chattels, and for the specific performance of contract.<sup>1</sup>

This classification is intended to be suggestive rather than exhaustive. Absence of remedy at law formed the condition precedent to the use of a subpoena ; but it does not follow that the chancellor granted relief in every case in which a petitioner would have been helpless at law. True, Archbishop Morton in the heat of argument declared emphatically that no one who came to chancery should leave the court without a remedy,<sup>2</sup> but this rough-hewn clerical maxim was never intended to be interpreted literally. Rather does it suggest the motive which prompted the chancellor's intervention, and of this we must say a few words.

#### The Motive of the Chancellor.

In an interesting case, of which there is fortunately a comparatively full report, the chancellor set out certain specific cases in which relief would be granted by subpoena. Mordant, counsel for the defendant, immediately generalized these instances, and affirmed that the jurisdiction of the court of chancery was dependent upon breach of confidence.<sup>3</sup> The chancellor, however, refused to accept 'breach of confidence' as the sole ground of appeal to equity ; instantly he cited an

could he secure the obligation by bringing *Detinue* against the defendant ; for he could not bring suit against the defendant at law).

<sup>1</sup> Of course it is to be noted that the chancellor enforced specific performance of contracts before the common law had developed an action applicable to *parol contract*.

<sup>2</sup> Y. B. 4 H. VII. 4. 8.

<sup>3</sup> '*Mordant* : In tous les cases per Monseigneur le Chancellor ils sont mesles oves confidence, et pur ceo qu'il n'ad aucun remedy per le Comon Ley, uncore sur le confidence que les parties mettrent in les autres a avoir les choses accordant a le covenant entre eux . . . est bon conscience qu'il sera aide per cest Court . . .' Y. B. 7 H. VII. 10. 2.

example which suggested a wider principle: 'If one has no writing (i. e. deed) and his debtor dies, there is no remedy by the common law; nevertheless here by this court of<sup>1</sup> conscience he will have a remedy.'<sup>2</sup> Huse and Bryan JJ. accepted the implication; for the reporter is particular to note that they affirmed *clearly* that a remedy existed in conscience where there was none at common law.<sup>3</sup>

This remark of the chancellor becomes significant when we remember the social conditions of the fifteenth century.<sup>4</sup> Feudalism was beginning to give way, but one of its greatest monuments, the common law, had yet to shake off the shackles of its origin. Not only was there a revival of culture, but a tremendous impetus was given to commercial enterprise. One has only to read the calendars of chancery to discover the introduction of a strong foreign element in English trade and commerce. Agreements and arrangements of daily occurrence demanded recognition; but a system of law inextricably interwoven with tenure in land could not easily adapt itself to a changing environment. The deficiencies of the common law became the more apparent as trade increased; merchants were not prepared to embody their contracts in a highly technical form. The very essence of business development lies in the possibility of fluid and formless agreements which may be easily made and easily changed.

Nor was it only the commercial class which felt the restraint of a rigid and unyielding system of law. There were hosts of 'accords' and 'bargains' among people of humble life, who from ignorance or lack of means did not observe the technicalities of legal forms. The parties agree to sell land, or to make a marriage settlement; there is no clerk or 'learned man' present, and the agreement remains formless because there is no one of sufficient skill to incorporate it in a deed. The reality of agreement is present, but it lacks the sacra-

<sup>1</sup> The Year Book reads 'in'. I have translated otherwise because of the common reference to chancery as the 'court of conscience'. Perhaps a better rendering would be: '... by this court (i. e. chancery) he will have a remedy in conscience'. The meaning is the same in either case.

<sup>2</sup> Y. B. 7 H. VII. 10. 2.

<sup>3</sup> *Idem*.

<sup>4</sup> See Vinogradoff, L. Q. R., xxiv. 373.

mental mantle of form. And so the bargain is no bargain at law. It needed the touch of humanism to render the law sensitive to the practical needs of the fifteenth century.

It was this breach which the chancery undertook to fill. Behind the scattered remarks of the chancellors, behind the petitions themselves, we see the motive which prompted the relief: the desire, namely, in the interests of commerce, and, if you will, of the community at large, to supply the defects, the 'gaps' of the common law. Let us look at them again by way of *résumé*.

Money is lent abroad. The common law cannot take jurisdiction, but equity intervenes. Services are rendered or goods are sold, but no definite recompense is agreed upon by the parties; services are rendered to a third party at the request of the defendant; a debt is assigned by parol; an obligation which proves a debt is lost or mislaid. In all such cases the creditor will fail if he brings Debt; in chancery he finds a remedy. Again, a foreign merchant<sup>1</sup> is temporarily in London; his ship is unfreighted in the dock, and he cannot wait to bring suit at law. The chancellor takes cognizance of his claim and provides a speedy remedy. A debtor acknowledges a debt by signing a bill 'testifyinge the same after the course of Marchaundice'; subsequently he refuses to pay, 'contrary to the Cours of trewe Marchaundice'.<sup>2</sup> The proof is insufficient at law; it is accepted in chancery. Constantly in the chancery petitions we find references to the customs of merchants, the ordinary course of commercial dealings, which, while sufficient as business transactions, failed to meet the requirements of the common law. In a well-known passage<sup>3</sup> the chancellor treated the law merchant as synonymous with the law of nature which it was his peculiar duty to observe, and one cannot read the petitions without feeling

<sup>1</sup> Cf. the remark of the chancellor in Y. B. 13 Ed. IV. 9. 5: 'Cest suit est pris par un marchand alien que est venue par safe conduct icy, et il n'est tenuz de suer solonque le ley de le terre a tavier le trial de xij homes, et autres solempnities de le ley de terre, mes doit sues icy, et serroit determine solonque le ley de nature en le chancery et il doit suer la de heur en heur et de jour pur le sped des Marchants . . .'

<sup>2</sup> XXVIII. 210.

<sup>3</sup> Y. B. 13 Ed. IV. 9. 5 (*ad fin.*).

convinced that merchants appealed to him with the conviction that they would secure a ready hearing.<sup>1</sup>

Again, a vendor agrees to convey land on the payment of the purchase price. The money is paid over, but the vendor breaks the agreement. Land is promised by way of a marriage settlement, the marriage is performed, but the promise remains unfulfilled. In neither case will the common law aid the disappointed promisee. In both cases he finds relief in equity. We might continue to note particular examples, but those which have been given must suffice. The point we wish to stress is this: as one traces the chancellor's jurisdiction step by step, one finds that equity is continually providing, or endeavouring to provide, for such cases as were neglected by common law, wherever some general interest would derive benefit from their recognition. This is the motive which stirred the chancellor to action.

The mere fact, however, that the common law provided no remedy for a particular case was not in itself enough to induce the chancellor to intervene. Something else must exist. And so we find that a petitioner always bases his claim for relief on a principle, ordinarily expressed by two words, 'reason and conscience'. The ordinary phrasing of the petitions is easily seen from one or two examples. The defendant has promised to convey land on marriage, but he has broken his promise; the petitioner asks that he be made to 'appere afore you (i. e. the chancellor) in þe Chancel-lerie of our lord þe kyng atte a certain day and upon a certeyne peyne by you to be lymyted, there to aunswere unto þe seid premisses and þere mak hym do þat *good feith, right and conscience* aske and require, for þe love of god and by way of charite. . . .'<sup>2</sup> Another asks that the defendant be brought into chancery by subpoena and there examined 'issint que

<sup>1</sup> The desire to protect merchants, especially foreign merchants, was responsible for many interventions of the chancellor. It even had an effect upon the common law of the fifteenth century. For example, the doctrine that 'a bailee might be guilty of theft if he "determined the bailment" before he misappropriated the goods . . . seems to have been forced upon the judges by the chancellor for the satisfaction of foreign merchants'. P. & M., ii. 179, note 2.

<sup>2</sup> XVI. 386, *Cases*, p. 197.

remedie ent soit fait a dit suppliant solonc ceo que reson et conscience demaudent. . . .<sup>1</sup> The statements above given are fairly typical of the whole of the chancery material.<sup>2</sup> The particular form of expression may vary, but the principle alluded to is the same. Wherever a matter of conscience arises, remedy is to be found in chancery, though there be none at law.<sup>3</sup>

### Reason and Conscience.

The use of these words was no peculiarity of the chancery. We find common law judges referring to matter of conscience and right,<sup>4</sup> but conscience as a principle is found in chancery alone. To the lawyer schooled in the traditions of the common law, the operation of this principle seemed too much a matter of whim and caprice. The chancellor's disregard of precedent, his tendency to isolate a particular case and decide it upon principles of natural justice, appeared to open the door to wanton interference with the law of the land. In one of the sixteenth-century tracts a 'Serjaunte at the lawes of England' complains bitterly of what appears to him the haphazard action of chancery. And what is this 'conscience' which avails the chancellor? he asks. It is 'a thinge of great uncertaintie; for some men thinke that if they treade upon two strawes that lye acrossse, that they ofende in conscience, and some man thinketh that if he lake money and another hath too moche that he may take part of his with conscience; and so divers men divers conscience; . . . so me seemeth, that

<sup>1</sup> VII. 250, *Cases*, p. 179.

<sup>2</sup> e. g. IV. 100, *Cases*, p. 173 ('que le dit suppliant purra aver ceo qe reson et bon conscience demaudent'); X. 39 ('de faire droit a dit suppliant solonc ceo que droit, bon foy et conscience demaudent'); XV. 140 a, *Cases*, p. 192 ('to do and receyve þat gude fath and consiens requireth'); XIX. 404 a, *Cases*, p. 207 ('contrary to all good feith and conscience'); LIX. 114, *Cases*, p. 225 (The defendant refuses to build a mill, 'contrarie to his seid promyse, good feithe and conciens'; petitioner asks that he be 'rewled and juged as good conciens requyreth'); LIX. 117, *Cases*, p. 226 ('contrarie to his seid promyse and good conciens').

<sup>3</sup> Cf. Brooke, Abr., *Parlement et Statutes*, 33: '... ou matter est enconter reason et le party n'ad remedy a le common ley il suera pur remedy in parliment, et nota que a ceo iour plures de ceux suitz sont en le court de Chauncerie'. The reference is to 37 Ass. pl. 7, but it appears to be incorrect.

<sup>4</sup> e. g. Newton C.J. in Y. B. 20 H. VI. 34. 4.

if the kinges subjects be constrayned to be ordered by the discretion and conscience of one man, they should be put to a greate uncertaintie. . . .'<sup>1</sup>

Some utterances of the chancellor, as reported in the Year Books, seem to give pertinence to this criticism, if they are read as unrelated statements. The principle enunciated is often vague and indefinite; it seems to shift and vary according to the idiosyncrasies of the particular chancellor. One of two executors releases a debt due to the estate of the testator without the consent of his co-executor. Both the executor and the debtor are brought into chancery by subpoena. Counsel for the defendant contends that as each executor has full power, his act cannot be attacked. But the chancellor brushes aside this technicality. Each rule of law, he says, is, or ought to be, conformable to the law of God (le Ley de Dieu). Then with an eye to the particular facts of the case at issue, he reduces the law of God to one specific statement: 'le ley de Dieu est q'un executor qui est de male disposition ne expenderoit tous les biens, etc.' If the executor who has expended the assets of the estate does not make amends according to his ability, 'il sera damne in Hell'; but the chancellor is not content to stop short with forecasting the melancholy consequences of such recalcitrance. He immediately asserts that to provide a remedy for such a case is 'bien fait accord al' conscience'.<sup>2</sup> Again, an obligee brings suit upon an obligation in a different county from that in which it was made. The obligor appeals to chancery, and the chancellor holds that the action is brought against conscience, 'car le verity de nul chose poit estre conus cibien en nul lieu q'en le com' l'ou le chose fuit fait.'<sup>3</sup> Obviously the chancellor is acting upon some principle of general jurisprudence, but we see the principle, not in its large outlines, but as it is specifically applied to a particular case. The only way in which we can hope to solve the riddle is by bringing analogous cases together.

In so doing, *Doctor and Student*, that amazing treatise

<sup>1</sup> Hargrave's Law Tracts, 326.

<sup>2</sup> Y. B. 4 H. VII. 4. 8.

<sup>3</sup> Y. B. 9 Ed. IV. 2. 5.

in which St. Germain embodied his wide knowledge of both canon and common law, is of great assistance.<sup>1</sup> We observe that the canon law did find a guiding rule in conscience, and this peculiar coincidence points, it seems irresistibly, to a 'process of indirect reception of canon law' in chancery.<sup>2</sup> This 'conscience', however, is not the conscience of some particular individual at which the serjeant of law levelled his criticism. It is rather a broad and flexible principle. To trace it even in outline would lead us into the network of canon law ; and so far as St. Germain is concerned, the question has been carefully analysed elsewhere.<sup>3</sup> Suffice it to say that St. Germain states distinctly that equity makes exception from the law on the ground of reason and conscience. In chancery we find the general principle applied to concrete legal problems, and our interest here lies not so much in the source of the doctrine as in the way in which it worked out in practice. Now the application of the principle of conscience in chancery resulted in the formulation of three distinct classes of cases which found protection in the subpoena : (1) cases in which parties had failed through ignorance or carelessness to avail themselves of their rights ; (2) cases of transactions based on confidence ; (3) cases of parol contract. The second class involves matters which are essentially equitable in the modern sense of the word. This we may ignore and give our attention to the other two.

*I. Cases in which a party has failed to avail himself of his rights.*

We find the most pertinent illustration of this class of cases in the chancery doctrines with regard to obligations under seal. A debtor has paid a debt proved by an obligation, but he has neglected to have the obligation cancelled or to secure an acquittance. In consequence he has no proof of payment which will be accepted by the common law. Again, an obligation

<sup>1</sup> In this brief consideration of Doctor and Student I have followed the analysis of Professor Vinogradoff in L. Q. R., xxiv. 373 ff.

<sup>2</sup> Vinogradoff, L. Q. R., xxiv. 378.

<sup>3</sup> Vinogradoff, *loc. cit.*

is made to secure the performance of a certain act, or it is conditioned by parol. The obligor might have protected himself had he taken the pains to have the condition (or intent of the obligation) inserted in the deed itself. The law treats this mistake on the part of the obligor as his folly; it refuses to modify a general principle to do justice in a particular case. An obligation is made in payment for the conveyance of land; the vendor keeps the bond, but refuses to make conveyance. In such instances the chancellor intervened to protect the obligor. But the rights of the obligee were also regarded. If he had lost his obligation, or mislaid it, but is able by extraneous evidence to establish a just debt, equity will assist him in obtaining it.

It was not alone in the domain of obligations that the chancellor found application for this principle. A does work for B, but there is no agreement as to the definite sum he is to receive for his labour. Goods are sold, but the price is not fixed. A benefit is conferred upon a third party at the request of the defendant. Goods are bailed to A, but they come into the possession of C, and the bailor cannot connect the possession so as to bring an action against C. There is no question in any of these examples of the right to recover, but the case cannot be brought within the scope of a common law action.

In brief, all these transactions are from the point of view of common law irregular. The law does not order a man to pay a debt twice or to perform services gratuitously. It offers him certain means of protecting himself, but if he fails to avail himself of these, he places himself beyond its protection. The chancellor, on the other hand, who was not bound by precedent, nor under the necessity of maintaining the supremacy of inflexible legal rules, was able to decide each particular case on a principle of general jurisprudence. If we apply the text of 'reason and conscience' to the situation, the answer is plain. And so upon this principle chancery 'excepted' from the common law.

## II. *Enforcement of Parol Contract.*

In the *Diversity of Courts* it is written that 'a man shall have remedy in Chancery for covenants made without specialty if the party have sufficient witness to prove the covenants'.<sup>1</sup> I do not propose to introduce any further evidence in proof of this statement. I believe it has been shown that the chancellor did enforce certain parol promises, and that he did so upon the principle of reason and conscience. It is granted even by Professor Ames that the chancellor did enforce certain parol agreements, but this admission is qualified by the assertion that he did so 'only upon the ground of compelling reparation for what was regarded as a tort to the plaintiff or upon the principle of preventing the unjust enrichment of the defendant'.<sup>2</sup>

If then it be said that the promisor is under an obligation to perform his promise, upon what principle did the chancellor enforce this obligation? Now every breach of contract which is accompanied by damage bears a strong analogy to a tort, if in fact it does not amount to one. But an obligation arising from a tort is plainly distinguishable from one arising from contract. In the one case it proceeds contrary to the will of the person bound; in the other it is in accordance with, and in fulfilment of, his will. Does the chancellor then enforce the obligation, because the breach of promise amounts to a tort to the plaintiff, or because he holds that one who has for legitimate cause made a promise ought to carry it out? In other words, in his analysis of agreements, did the chancellor proceed upon a principle of tort or of contract? This is the question which I shall endeavour to answer. But first I shall examine some illustrative cases.

1456. A was to marry B, daughter of C. It was agreed that A should make an estate of lands to himself and B, &c., and that C 'for the . . . marriage and ioynture' should make an estate of lands to A and B and their heirs. The marriage took place; A made the estate to himself and B, but C refused to carry out his part. A accordingly brought a subpoena against C. The chancellor, after examining the evidence,

<sup>1</sup> Holmes, *Early English Equity*, L. Q. R., i. 172.

<sup>2</sup> Ames, *H. L. R.*, viii. 257.

decided that the matter set up in the petition was true and just, and decreed that, as B was dead leaving issue, C should make an estate of the land to A and his heirs.<sup>1</sup>

1464-5. A made B 'le proctour de son benefice et luy promise per fidem que il luy garderait indemne'. A resigned the benefice to B's damage and B brought a subpoena for the breach of promise. The chancellor remarked: 'Pur ceo que il est en damages par le non perfourmans de le promise, il avera remedye icy.'<sup>2</sup>

1467-1468. A was bound to B in an obligation of £100. B told A that if he would furnish C (B's son) with goods and money on request, he would make payment therefor. A furnished C with goods and money to the value of £94, receiving from C, in the name of his father, bills witnessing the delivery of the goods, &c.; at the same time C promised on behalf of B that A should have deduction of £94 on the obligation of £100. Afterwards A tendered B the bills for £94 and £6 in money, and desired him to receive them on satisfaction of the obligation. B refused, and A brought a subpoena. Much evidence was introduced by both parties. The chancellor decided that A had proved his case, and that the obligation of £100 should be considered 'vacuum et nullius valoris'. Accordingly he ordered it to be cancelled.<sup>3</sup>

1470-1471. A at the request of B, and on his promise to save him harmless, became surety to C for the debt of D. D did not pay the debt, and in consequence A was threatened with suit by C. As B had died, A called upon B's executors to carry out the promise; but they refused. He accordingly brought a subpoena. The chancellor decreed that the executors should discharge A against suit from C.<sup>4</sup>

What situation do these cases disclose? There has been a breach of promise by non-feasance which is succeeded by damage, immediate or prospective, to the promisee. This element of damage is frankly suggestive of tort. It would be possible, if we did not scruple to strain our reasoning, to resolve the gist of the cause of action into a tort to the plaintiff, even a deceit. Such would be the line of reasoning followed by the common law. But I do not think one could

<sup>1</sup> XXV. 111 (10 S. S. 141).

<sup>2</sup> Y. B. P. 4 Ed. IV. 4.

<sup>3</sup> XXIX. 13, *Cases*, p. 214. I have simplified the facts, and omitted consideration of the defendant's answer (XXIX. 12, *Cases*, p. 216).

<sup>4</sup> XLIV. 142, *Cases*, p. 222. For the defendant's answer, see XLIV. 143, *Cases*, p. 224.

make a greater mistake than to impose upon the cases in equity the peculiar theory of the common law.

In the first place, why did the common law treat a breach of promise as a deceit to the promisee? I believe a ready and conclusive answer is found in the history of Assumpsit. Here we find another example of the manipulation of the substantive law through the exigencies of procedure. From the standpoint of contract, a breach of contract was a breach of covenant, but I scarcely need remark that a breach of covenant was actionable only in case the covenant was under seal. It was never suggested by any common law judge that a breach of covenant was a tort, a deceit to the plaintiff. Such reasoning was unnecessary. But the promise may be the same in essence whether it be under seal or no. A for £50 in hand paid promises to convey Blackacre to B. A breaks his promise. If the promise is under seal, Covenant lies, *because the promise is broken*. The law says in effect that one who makes a promise in a deliberate and formal way is bound to fulfil it, irrespective of the situation of the promisee. If, on the other hand, the promise is verbal, Assumpsit lies.<sup>1</sup> But herein the law adopts a different line. Assumpsit lies because by the breach of promise *A has deceived B*. It does this in order to bring a breach of contract within the scope of an action which sounds in tort. Thus on substantially the same state of facts the law adopts a contractual theory for breach of promises under seal, a theory fundamentally tortious for breach of verbal promises. There is no logical basis for this distinction; counsel and judges were aware of this, as the constant argument in the early cases in assumpsit, 'this is a breach of covenant', bears witness. The distinction finds its justification in the history of the forms of action and there alone. Had the ingenious suggestion of Blackstone,<sup>2</sup> that Assumpsit is an action on the case analogous to Covenant, been literally true, the law might have adopted a different theory for parol contract.

In equity the situation is different. There was no pro-

<sup>1</sup> I refer, of course, to the action in the sixteenth century.

<sup>2</sup> Blackstone, iii. 158.

cedural necessity for treating a breach of contract as a tort. There was no division into forms of action; there were no technicalities of pleading to obscure the real issue. We stand, so to speak, before breach of contract as a question of first impression. Analysis may lead us in the direction of tort or contract; but both ways are open, and there is nothing to compel us to take the one in preference to the other. I wish, therefore, to submit such evidence as I have been able to find which indicates the attitude of the chancellor in questions of contract.

1. The chancellor was an ecclesiastic, and probably carried with him into the chancery the principles and theories of the ecclesiastical court. It is notorious that the ecclesiastical court did assume jurisdiction over *laesio fidei*. What more natural than that the chancellor should have proceeded upon the ground of breach of faith? There is at least a suggestion of this in the petitions. In *Wheler v. Huchynsen*<sup>1</sup> a pledge of faith is alleged, and it is quite common to find a petitioner saying that the defendant, 'promitted by hie feith'<sup>2</sup> or 'promyitted by his feith'<sup>3</sup> or promised 'on his faith and troueth'.<sup>4</sup> In one of the cases<sup>5</sup> stated at length above, a promise 'per fidem' is set forth. It would be venturesome, however, to assert that breach of faith was the sole ground upon which chancery took jurisdiction. It has been argued that if the chancellor proceeded upon this ground, 'equity would give relief upon any and all agreements, even upon gratuitous parol promises'.<sup>6</sup> I do not think it necessary to base the chancellor's jurisdiction on breach of faith alone; but that he did enforce gratuitous promises cannot be doubted.<sup>7</sup> In this

<sup>1</sup> 2 Cal. Ch. ii.

<sup>2</sup> XIX. 345, *Cases*, p. 204.

<sup>3</sup> XVI. 277.

<sup>4</sup> XIX. 91.

<sup>5</sup> Y. B. P. 4 Ed. IV. 4, *supra*, p. 161.

<sup>6</sup> Ames, H. L. R., viii. 255.

<sup>7</sup> In XLIV. 142, *Cases*, p. 222, there is a clear case of a gratuitous promise which was enforced against the promisor's executors. See also XIV. 5, *Cases*, p. 188 (Promise made by a surety); XV. 248 (Money advanced to A upon the promise of B, assuring payment); XV. 52, *Cases*, p. 191 (Promise to carry a letter); XXXI. 82, *Cases*, p. 219 (Promise to respite an action); XXXI. 118 (Promise by arbitrators to deliver an award *in writing*). The following promises connected with marriage appear to have been gratuitous: VII. 250, *Cases*, p. 179; XVI. 386, *Cases*, p. 197; XXVIII. 299, *Cases*, p. 213.

connexion, however, I do not wish to consider breach of faith except in so far as it tends to point to the promise as the essential factor in the chancellor's consideration of parol contract. The fact that some petitioners take occasion to mention a pledge of faith, coupled with our knowledge that gratuitous promises were enforced, seems to me a very strong indication that chancery was employing a purely contractual principle.

2. If we turn to the petitions and notice the way in which complainants state their case, we find that it is the promise of the defendant upon which stress is laid. If in fact the chancellor did consider breach of promise a deceit to the plaintiff, it is very curious that pleaders who were constantly appearing before him do not make use of so convenient an allegation. But they do not do so. Rather do they say that the defendant has made a promise which reason and conscience require him to perform. The defendants refuse to make a conveyance 'solonque lour covenantz',<sup>1</sup> or 'accordantz as covenantz et bargoyne suisditz';<sup>2</sup> another defendant is asked 'to shewe whi your seid besecher shuld not be content *after promys made* betwix them'.<sup>3</sup> Emphasis is laid upon the promise as the indispensable part of the case.

3. In certain cases the beneficiary brings the subpoena. These cases have been considered at length already<sup>4</sup>; at this point I wish merely to refer to the significance of the right of action in the beneficiary. It seems to mean this. If there is sufficient cause for a promise which is deliberately made, the chancellor holds the promisor to his obligation at the behest of one who has a right to obtain some advantage from the fulfilment of the promise, although he is not the promisee. The principle upon which the subpoena is allowed cannot be 'detriment to the promisee', for the complainant is not the promisee; it cannot be a 'tort to the plaintiff', for there is nothing but a breach of promise. But there is a reason why the promise should be fulfilled, and this reason lies in the circumstances under which the promise was made; it is

<sup>1</sup> IV. 96, *Cases*, p. 173.

<sup>2</sup> LXXI. 7, *Cases*, p. 233.

<sup>3</sup> IV. 100, *Cases*, p. 173.

<sup>4</sup> *Supra*, p. 126.

suggestive of the fundamental canonistical doctrine of 'cause'. Marriage seems to have been an adequate 'cause' for a promise, and it is for the enforcement of promises given for marriage that we most frequently find beneficiaries appealing to equity.

4. Again, if we look at the conditions under which an implied contract arises, some light may be thrown upon the whole question. The petitioner at the request of X became 'pledge' to the king for a farm which X held of the king, and through X's default has had to pay.<sup>1</sup> Again, petitioner 'at request and praier' of B became bound to C as surety for B's debt, and as B has failed to meet his obligation C called upon the petitioner.<sup>2</sup> A at B's request 'undertook' for B in Ireland for certain customs; B inconsiderately sailed away and left A to meet his obligation.<sup>3</sup> In none of these cases is there an express promise, but a promise is raised by the relation in which the parties stand to each other. As the petitions phrase it, inasmuch as the petitioner has been *put 'in charge'* for the duty of the defendant and at his request, reason and conscience require that the defendant should *discharge* him. Even where, under similar circumstances, there is an express promise, the same process of reasoning is adduced to support its enforcement. Reasoning, therefore, from the implied to the express contract, we may conclude that the promise is enforced because there is some imperative reason why the promisor should fulfil his obligation, and this reason is found in the circumstances under which the promise was made.

5. Finally, the suits brought for specific performance of contracts to convey land lend support to the view here advanced. While there are many cases in which the promisee has paid the whole purchase price, there are many others in which he has paid nothing; but alleges that he is ready to pay. The only damage sustained is the 'loss of the bargain', that is, the loss of the advantage which would accrue to the promisee, if the promisor carried out his promise. The obligation is purely contractual; there is not the faintest suggestion of a tort.

<sup>1</sup> X. 186.

<sup>2</sup> XVI. 440.

<sup>3</sup> XV. 237.

For these reasons I believe that the attitude of the chancery towards contract was radically different from that of the common law before consideration became the recognized test of the enforceability of promises. The common law looked primarily at the promisee; it compelled him to show that he had sustained damage other than that which resulted directly from the breach of contract. He must convert the breach of promise into a tort, a deceit, to himself. Chancery, on the other hand, scrutinized the position of the promisor. It asked whether he had made such a promise as in reason and conscience he ought to perform. In such an inquiry the benefit to the promisor or the immediate detriment to the promisee was a matter of secondary importance. It was forced into the background, while the promise and the circumstances under which it was made held the centre of the stage.

It is with considerable hesitancy that I venture to make any generalizations, but an examination of the chancery proceedings has led me to the following conclusion. I believe that the chancellor held that one might make a valid promise to do anything which was reasonable and possible, and that the obligation resulting from such a promise ought to be performed because the promisor had deliberately and intentionally assumed the obligation.<sup>1</sup> By this I do not mean that the chancellor enforced any and all promises. But in his analysis of parol contract he did not require as an essential condition to a right of action that the promisee should have been deceived or that the promisor should have been benefited. Rather did he inquire whether the enforcement of a particular promise would further some general interest. If the promisor has led the promisee to alter his position on the strength of the promise, there lies upon him a moral duty to fulfil that promise. It is desirable, in the interests of the community at large, that such promises should be enforced. A pays B £50 for a conveyance of land, or upon B's promise to deliver a letter A entrusts the letter to him. The cases are different from B's point of view. In the first case he has received a benefit; in the second, there is no benefit. But in

<sup>1</sup> Cf. Spence, 852.

determining whether or no B shall be compelled to perform his promise, we look to some larger interest than that of the immediate parties to the contract. B induced A to give him the letter; he placed in A's mind a reasonable expectation that it should be delivered. Is it in the general interest that such an expectation should be fulfilled? The chancellor, I believe, determined that it was.

Closely connected with this factor is another. Some promises appear to have been enforced because of the object for which they were made. Thus money is promised for a marriage; the chancellor decrees that the promise must be performed. We might say that the promise is enforced because on the strength of it the promisee has entered upon marriage. But the fact that the beneficiary could bring the subpoena argues against this. I believe that such a promise was enforced because of the purpose for which it was given.

All this is admittedly speculative. One must be frank, and admit that it is impossible to determine absolutely the ground upon which chancery proceeded. But it seems to me that we are driven to seek the source of the chancellor's doctrines in the canon law. I have tried to state my reasons for thinking it impossible that the chancellor should have applied the theory of the common law. Hence we must look to the only other system from which he could possibly have borrowed his theory.

In the discussion of 'consideration' which St. Germain places in the mouth of the Doctor, we find it stated that a promise, to be enforceable, must have a *reasonable cause*. This cause may consist in a material advantage to the promisor, or in the object for which the promise was made. I do not think we can completely parallel the whole classification of promises, as set forth by the Doctor, in the cases in equity, but I do believe that all these cases can be explained from the principles of canon law. Therein seems to me to lie the only adequate and reasonable explanation. It is very probable that the chancellor as a judge in chancery did not proceed to the same lengths as he would have done in the ecclesiastical court. But when confronted with a new situation

in chancery he did apply so far as possible the principles of that system in which as a churchman he was trained. This indirect reception of canon law is not demonstrable with mathematical precision; it seems to me, however, that the whole line of decision in equity points unequivocally towards the canon law.

I have attempted to set forth the main outlines of equitable jurisdiction in contract. Of the source of the chancellor's doctrines, the canon law, little has been said. But an investigation of the principles of the canon law with regard to contract is in itself a special study.

## NOTE A

THE diversity of opinion in modern times with regard to the action of Detinue will appear from the following quotations :

‘The action of detinue is an action of wrong . . .’ Bayley B., in 1 C. & J. 570 (1831).

‘Detinue falls within that class of actions called actions of contract, and the whole course of the proceedings shows that it is rather matter of contract than of tort . . .’ Tindal C.J., in 3 M. & G. 557 (1841).

The County Courts Act, 1850 (13 & 14 Vict. c. 61), treats Detinue as founded on contract.

The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), treats Detinue as a tort.

‘Detinue is clearly in form an action *ex contractu* . . .’ Erle C.J., in 11 C.B. [N.S.] 426 (1861).

‘According to all authorities . . . detinue has always been considered to be an action *ex contractu* . . .’ Byles J., *idem*, p. 427.

Tidd classes Detinue (with Case and Trespass) among ‘actions for wrongs’. 1 Tidd’s Pr. (8th ed.), pp. 4, 10–11.

Note also the interesting case of *Bryant v. Herbert* (1878) 3 C. P. Div. 389. The plaintiffs had delivered to the defendant a painting, in order that he might determine whether it was a genuine picture painted by himself or not. Having come to the conclusion that it was not genuine, the defendant refused to redeliver the painting, and the plaintiff accordingly brought Detinue against him. The question raised was whether the action was an action ‘founded on tort’ within the meaning of the County Courts Act (30 & 31 Vict. c. 142, s. 5). It was held that so far as this case was concerned, the action was founded on tort within the meaning of the Act, and though the judges did not profess to decide the historical question their comments are worth quoting.

Thus Bramwell L.J. said: ‘But if the old learning, as it was called, is to be brought in to help us, I should come to the same conclusion (i. e. that the action is founded on tort). No doubt dicta and decisions are to be found that detinue is an action *ex contractu*

or *ex quasi contractu*, &c., but there are dicta and decisions the other way. . . . The last case I know of is *Clemens v. Flight* (16 M. & W. 42). This clearly holds that the action is founded on a tortious detention. I should therefore come to the same conclusion if these considerations governed the case.'

On the other hand, Brett L.J. (who concurred with Bramwell in the decision of the case) said: ' . . . the action of detinue is technically an action founded on contract. The action was invented to avoid the technicalities of the old law: the invention was to state a contract which could not be traversed. Therefore I think the action of detinue, or the form of the action of detinue, so far as the remedy is concerned in its legal significance, was founded on contract.'

## NOTE B

### *Trespas sur le Cas*<sup>1</sup>

Un R. suist un bref de trespas sur le cas et counta coment le plaintiff avoit bargaine certain terre pur certain some del defendant et monstre tout en certain, et que le covenaut le defendant fut que il doit faire estraunge person avoir releas a luy deinz certain terme, le quell ne relessa poynt ; issint l'accion accrue a luy.

*Elleker* : cest accion sowne en nature d'un covenaut, en quell cas il duist avoir ewe un bref de Covenaut et non ce Accion : iugement de bref.

*Newton* : et en taunt que le trespas est conuz de vous et [vous]<sup>2</sup> ne monstrez autre matier, [nous] demandons iugement, etc.

*Elleker* : semble que le bref abatera ; qar divers cases devant cel iour ont estre tenuz pur ley en semble maniere, come en cas que ieo face covenaut ove un Carpenter pur moy faire un meason deinz certain iour, il ne fait moy le meason, ieo n'avera null accion sinon bref de Covenaut. Et mesme le ley est s'un emprent sur luy de shoer mon chivall et ne face, Autre accion n'avera ieo sinon bref de covenaut, s'il issint soit q'il ne face et faille l'especialte faille l'accion ; issint icy il ad empreint sur luy de faire estraunge per-

<sup>1</sup> This transcript is taken from MS. Harl. 4557, 112 verso ; the case is also reported in MS. Harl. 5159, 150 recto, but as there are only slight verbal variations they have not been noted. For the Year Book report, see 14 H. VI. 18. 58.

<sup>2</sup> The words in square brackets are supplied.

sone releaser, le quell est un covenaut, et est monstre que eux n'ount relese le quell n'est autre que covenaut enfreint, pur que semble [que] le bref abatera.

*Newton* : semble le contrarie et que le bref est bon ; qar en cas de Carpenter que *Elleker* ad mys ieo voill bien q'il soit ley, mes s'un Carpenter moy face covenaut de moy faire meason bon et fort sur un fourme en certain et il moy face meason que est deble et male et sur autre fourme, i'avera bon accion de trespas sur le cas. Auxi s'un ferrou face un covenaut ove moy pur shoer mon chivalle bien et congeablement et il eux shoe et encludd i'avera bon Accion sur mon cas. Auxint si un leche emprent sur luy de moy sayner de mez lessez, et il done A moy medicynez mes ne moy ensana, i'avera bon accion sur mon cas ; auxint s'un home face covenaut ove moy pur arer mon terre en temps sesonable et il ce are en temps que ne sesonable, i'Avera accion sur mon cas ; et le cause est en toutz lez casez il ad enpris sur luy un matier en fait plus que ceo que soune en Covenaut et issint est il en cas al barre, il ad emprise sur luy q'un estraunger relese al plaintiff, le quel est un empris et en taunt que ce ne fait le plaintiff ad tort come en lez casez avaunt rehersez, par que. . . .

*Paston*, J. : semble a mesme l'entent ; et A ceo que est dit que un Carpenter face ove moy un covenaut de faire a moy un meason, s'il ne face ieo n'avera Accion sur mon cas, ieo die que si un oster ou ferrou face covenaut ove moy de shoer mon chivalle et il ne face, pur que ieo passa Avaunt et mon chival n'ad solers et est perdu pur defect de solers, i'avera accion sur mon cas ; et si vous que estes ad leges empristes sur vous par que i'ay perde i'avera accion sur mon cas issint semble A moy en le-cas Al barre que le bref est bon.

*June*, J. : semble a mesme l'entent, et come *Paston* ad dit, coment que mon ferrou ne shoe mon chivalle i'avera accion sibien s'il luy avoit shoe et cludd, quar tout ceo est dependaunt sur le covenaut et en taunt que ne forsque accessorie et dependant sur ceo que est le covenaut sibien come i'avera accion de ceo que n'est forsque accessorie, sibien avera ieo Accion de ceo que est principalle, par que. . . .

*Paston*, J. : c'est tresbien dit.

## APPENDIX OF CASES

### SELECT PETITIONS<sup>1</sup>

#### Bundle IV, No. 69.

A tres reverent pier en dieu l'evesque de Duresme et Chanceller  
D'engleterre.

After  
1417.

Supplie tres humblement Reynold Barantyn que come nadgairs estoit accorde perentre Robert Cluebrigg et le dit suppliant que mesme le suppliant deinz certain temps ore passe ferroit enfeoffer Katherine sa femme en certains terres et tenements al value de quarant marcz par an par terme de sa vie ; pur la greindre seurtee de quell chose Drewe Barantyn, nadgairs citezein de Loundres, qi dieu assoill, uncle de dit suppliant, estoit oblige a dit Robert en deux cents livres et le dit suppliant adonques soy obligea a l'avaunt dit Drewe en deux centz livres par un estatut marchant al entent que le dit suppliant garderoit le dit Drewe sanz damage et perde envers le dit Robert touchant la seurtee par le dit Drewe a l'avaunt dit Robert fait. Et combien que mesme le suppliant ad complie et parforme les choses desuisdit, issint que le dit Drewe ne nul autre pur luy n'est pas unqore, ne iammes, sera endamage envers le dit Robert ne nul autre pur le dite seurtee par le dit Drewe ensy fait ; nientmeins un William Randolf et certains autres persons, executours del testament de dit Drewe, par force de dit estatut par le dit suppliant a dit Drewe ensy fait, ont pursue mesme le suppliant et unqore poursuont a graunde damage de luy et encountre l'entent suisdite : Qe pleise a vostre tres gracios paternite de considerer les choses desuisditz et sur ceo d'envoier pur le dit William d'estre devaunt vous a un certain iour pur estre examine des ditz matiers, portant ovesque luy al dit iour le dit estatut marchant et que vous pleise par vostre hault discrecon d'ordeigner remede en ceste partie come la bon foy et conscience demandent, considerant que le dit suppliant autrement ne poet estre aide, pour dieu et en œvere de charitee.

<sup>1</sup> The reader will observe many mistakes of grammar and orthography, and some obvious *lapsus calami*, throughout the petitions. These are intentionally reproduced from the documents, which are very erratic in this respect.

## Bundle IV, No. 96.

A tres noble et tres reverent piere en dieu L'evesque de Dusreme  
(sic), chaunceler D'engleterre.

Suppliount humblement vos povres servantez, William Spenser et Robert Clopton, qe come le x<sup>me</sup> iour de Jun darrein passe un John Beverech del Counte de Cambrigge avoit venduz as ditz suppliantz un mees ove les appurtenantz en Shymplyng en la counte de Suff' pur xl livers, lez ceux sont paieez, par force de quell bargein ils ount faitz grauntez costez entour le mees suisdit; et qe le xij<sup>me</sup> iour de Septembre adonques proschein ensuant le dit John duist avoir delivere seisin de mesme le mees as ditz suppliantz solonque lour covenantz, le quel adonques il refusa et unqore refuse a graunt perde dez ditz suppliantz, considerantz, tres gracious Seignur, q'ils n'eient ent accion par le comun ley, n'autre remedie sinon de vostre especial grace et socour: qe please a vostre tres gracious Seignurie graunter ad ditz suppliantz brief directe al dit John de estre devant vous en la chauncerie al certain iour sur certain peine par vous alimiter pur y estre examinez et ent affaire come vous semble resoune, et ceo pur dieu et en oevre de charite.

Date  
uncertain.

## Bundle IV, No. 100.

A tres reverent pier en dieu et tres gracious Seignur l'evesque de Duresme Chaunceller D'engleter.

Supplie humblement vostre humble servitour, John Burton de Bristuyt, que come il le lundy proschien devant le fest de Seint Petre l'advincle, l'an du regne nostre Seignur le Roy octisme, a Bristuyt achata d'un Mark Wyllyam de mesme la ville certains terres et tenementz c'estassavoir xij mees, v salers et iiij gardeins en Bristuyt suisdit ove les appurtenantz, en noun de toutz les terres et tenementz oretarde un Richard Neweton de mesme la ville; sur quel bargayne l'avantdit Mark ferroit astat sufficiant en ley et livroit seisin et possession al dit John de les avantditz terres et tenementz ove les appurtenantz quant il fuist par le dit John ou ascun autre en son noun ent resonablement requis, pur un certain some d'argent, cestassavoir CCxl li, dount le dit John paia al dit Mark CC li, en partie du paiement de l'avantdit some de CCxl li. Et nient contresteant le paiement devant mayns par le dit John fait et q'il ad souvent requis

After  
1421.

le dit Mark de faire astat al dit John et luy lyvrer seisin et possession de les terres et tenementz suisditz en maner come avant est dit, le dit Mark ne voet faire astat ne lyvrer seisine et possession al dit John accordantz as covenantz et bargoyne suisditz de les terres et tenementz avantditz, a graunt anientisement et perpetuel destruccion de dit Suppliant s'il n'eit vostre gracious eide et socour en celle partie : Que please a vostre tres reverent paternite et gracious Seignurie, graunter brief direct al dit Mark pur apparere devant vous a certain iour sur peyn par vous alymyter d'estre examine de lez matiere suisditz et sur son examinacion luy ensy iustifier et govourner que le dit Suppliant purra aver ceo qe reson et bon concience demaundent en celle partie, Considerant, tres gracious Seignur, que le dit Suppliant ne poet mye aver remedie en ceo cas a la comune ley, et ceo pur dieu et en oevre de charite.

Plegii de proseguendo :

Willielmus Gastoigne de Brocley, Gentilman, in com' Som'.

Nichalaus Dany de Southpoderton, Gentilman, in com' Som'.

#### Bundle IV, No. 158.

8 Hen. V. Pleise a tres reverent piere en dieu et tres gracious Seignur l'evesque de Duresme Chaunceller D'engleterre considerer coment apres la mort Richard le Scrop, Chivaler Seignur de Bolton qui de nostre Seignur le Roy teigne en chief et qi heir est deinz age et en la garde nostre dit Seignur le Roy estoit a present, diverses patents, chartres, muniments et autres evidences touchantz le heritage mesme le heir a les mayns de William Mayhewe sont devenuz et unguor en ses mayns estoient, de graunter un brief de peyne direct a dit William luy comandant d'estre devant nostre Seignur le Roy en sa Chauncellarie a certeigne iour par vous alimiter, ameignant ovesque luy les patentz, chartres, munimentz et autres evidences suisditz en salvacion del droit nostre Seignur le Roy et ceo pur dieu et en oevre de charite.

*Endorsed* : Decimo septimo die Octobris anno etc. octavo, concordatum est per consilium quod sub magno sigillo dirigatur Willielmo Meyhewe infrascripto essendi (*sic*) coram domino Rege in Cancellaria sua in crastino sancti Martini proximo futuro, deferendo secum litteras, patentes, cartas, munimenta et alia de quibus infra fit mencio.

## Bundle VI, No. 20.

A tres gracios et tres reverent pier en dieu l'evesque de Wyncestre  
chaunceller D'engleterre.<sup>1</sup>

Suppliont humblement voz poverez Orateurs William Overay de Southampton et Agnes sa femme, que fut femme de Bartholomew Marmoray, executors del testament du dit Bartholomewe, que come un John Mascall, iadis Burgeis de Southampton suisdit, le trezime iour D'apprill l'an du regne le Roy Henry quint, qe qieu assoill, sisme, achata du dit Bartholomew a Southampton suisdit xl et vij bales de waide pur <sup>xx</sup>iiij et xiiij li. et ix d pur estre ent paier saunz delaie, dount le dit John paia a dit Bartholomewe iesques al sume de xxviiij li., les queux xxviiij li. le dit Bartholomewe en sa vie sovent foith apres ad demande de dit John Mascall et il les ditz xxviiij li. a dit Bartholomewe paier ne voleit ; le quel Bartholomewe fist la dite Agnes adonques sa femme et Tempene de Johane, son cosyn, ses executours, et devia, les quex Agnes et Tempene come executours [du dit].<sup>2</sup> Bartholomewe sovent foith apres la mort de dit testatour ount requie le dit John Mascall a eux paier les ditz xxviiij li. et il les paier ne voleit, et apres le dit Tempene devia et la dite Agnes prist a Baron le dit William Overay, les queux William et Agnes sovent foith requis le dit John Mascall a eux paier les ditz xxviiij li. et il les paier ne voleit ; le quell John Mascall fist ses executours, Margerie adonques sa femme et Henry Baron, et devia, apres qi mort les ditz suppliantz ount sovent foitz requie les ditz Margorie et Henry Baron come executours a dit John Mascall a eux paier les avantditz xxviiij li. et ils les paier ne volient, de queux xxviiij li. suisditz ne nul denier dicell le dit testatour ne les ditz suppliantz nient le plus ne avoient ascun obligation ou autre suertee forsque le simple contracte suisdit, en quel cas les ditz suppliantz sount saunz remede a la comune ley, a graunde damage de ditz suppliantz et en retardacion del execusion del testament suisdit, s'ils ne aient vostre tres gracios Segnurie en icell partie : Please a vostre tres gracios Segnurie de considerer les matiers suisditz et sur ceo solonc vostre treshaut et tres sage discrecion d'ordener et

1424 to  
1426.

<sup>1</sup> Bundle VI. No. 19 is a briefer statement of this case.

<sup>2</sup> Hole in document ; words in square brackets supplied throughout.

agarder que bone et due remidie soit fait en la mater suisdit as ditz suppliantz, come foy et bon concience le demaundent, pur dieu et en oevere de charitee.

Plegii de prosequendo :

Ricardus Thornes.

Johannes Sanky.

#### Bundle VI, No. 21.

A treshounree et tresgracious segnur et tresreverent pierre en dieu l'evesque de Wyncestre et Chaunceller D'engleterre.

Probably  
after  
1413.

Suppliant tres humblement les povres parochiens del esglyse de Kirkby en Kendale en la Countee de Westmerland que, come nadgairs lour esglise fust abatuz par veillesse et autres feblesse, ils fisrent [agreement]<sup>1</sup> ovesque un William Thornburgh Esquier, un des parochiens, q'il duist faire l'avaunt dite esglise bien et covenablement estre fait, reedifie et relever honestment et [reparaille]<sup>1</sup> pur sesse vyntz marcz, des queux l'avantdit William ad resceu quatorsze vyntz marcz et les ovesque luy retient ; et ensy est ore, tres gracious Segnur et pier en dieu, que l'avantdit William ne voet mye l'avantdit esglise faire estre fait ne reedifie issint que le Chauncell de mesme l'esglise est en point de chaiser pur defaute de fesure et edificacon dicell a graunde tort, disease et pierd des toutz les parochiens avaunt ditz, et les queux parochiens, tres gracious Segnur, en cest matier par le comune ley ne poent mye estre eidez en ascune manere ne socourez : Si plese as voz tres hounree et tres gracious Seignurie et tres reverent paternite d'envoier par brief nostre Segnur le Roy pur l'avaunt dit William de comparer devaunt vous en le Chauncellerie nostre Segnur le Roy sur un certain peine par vous alimiter et ensi ordeyner que cest matier par vous tres gracious Segnur poet solonc vostre tres sage et tres purveux<sup>2</sup> discrecon estre socouree et [remedie],<sup>1</sup> considerantz que les parochiens avaunt ditz ne purront mye avoir nul eide ne secoure a le comune ley, pur dieu et en oevere de charitee.

Plegii de prosequendo :

Thomas de Tunstall, chivaler.

Robertus Belyngeham.

<sup>1</sup> Hole in document.

<sup>2</sup> Or 'purveux'?

## Bundle VI, No. 299.

A tres reverent pier en dieux et son tres gracios Seignur, l'evesque de Wynchestre, Chaunceller D'engleterre. Supplie tres humblement John Hogham<sup>1</sup>, un des clerks del Chauncellarie nostre Seignur le Roy, qe come John Oklee, le lundy proschein devaunt le fest de Seint Michel l'archangele darrein passe, l'an du regne nostre dit Seignur le Roy q'orest quynt, tierce, a Loundres en la paroche de Seint Cristofore en la garde de Bradstrete, achata certains draps, laynes et diverses colours pur xxvj li., queux luy doit et luy detient encountre droit ad damages de dit John Hogham de x li., dount il prie remede, et ceo pur dieu et en oevere de charite.

After  
1416.

Plegii de proseguendo :

Ricardus Sturgeon.

Willielmus Robroke.

## Bundle VII, No. 104.

A tres reverent pier en dieux l'erchevesque D'everwyk Chaunceller D'engleterre.<sup>2</sup>

Supplie humblement Roger Denys de Loundres, Fremason, que come bargaine ceo prist a Wyburton parentre le dit suppliant et Philip Proketour de Wyburton et Roger Robynson de mesme la ville en le fest de Seint Martyn, l'evesque, l'an de regne le Roy Henry quint, pier nostre Seignur le Roy q'orest, oeptisme, que le dit suppliant ferroit l'esglise et le steple de la dit ville de Wyburton<sup>3</sup> en manere et forme contenuz en un escript endente ent entre eux fait, preignant pur le dit bargayne C <sup>xx</sup>iiij x marcz, come en le dit escript plus pleinement est contenuz ; et come en apres a la dit ville de Wyburton, c'estassavoir le lundy proschein apres le fest de Seynt Michell l'archangell adonques proschein ensuant, bargaine ceo prist saunz especialtee parentre le dit suppliant et les ditz Philip Proketour et Roger Robynson, c'estassavoir que le dit suppliant ferroit xij corbellez en la dit esglise et q'il ferroit enbatailler le dit esteple ovesque legementz et tables accordantz ovesque franke pere, pur

1426 to  
1432.

<sup>1</sup> Perhaps 'Hegham'.

<sup>2</sup> Bundle VII, No. 105, is another copy of the same petition ; there are slight variations, which are noted.

<sup>3</sup> After 'Wyburton', VII. 105 adds : 'de pleyn overaigne et de pere appelle rough stones saunz table ou corbell', and omits from 'en manere' to 'preignant'.

quele ils luy paieront a taunt come il expenderoit entre la faisaunce de le dit overaigne outre le primer covenaut suisdit, que amount a cent marcz, come il ad este aiugge par quatre maistres masons de frank pere ; Et les dit Philip Proketour et Roger Robynson les ditz cent marcz au dit suppliant paier ne voillent, et il est ensy, gracious Seigneur, que le dit suppliant ne poet avoir accion envers eux a le comune ley par bref de covenaut ne en autre manere, pur ceo q'il n'ad mye especialte de le covenaut, a graunde anientisement de dit suppliant, s'il n'eit remedié par vostre Seignurie en ycell partie : Please a vostre tres gracious Seignurie de considerer les premisses et de grauntier severalx briefs directz envers les ditz Phylip Proketour et Roger Robynson eux comaundantz de comparer devaunt vous a certain iour et sur certain peine par vous alimitier de respondre a les premisses, pur dieux et en oevre de charitee.

Plegii de prosequendo :

Ricardus Johnson de London.

Willielmus Bridde de London.

*Note on date of case.*—The transaction is said to have taken place in 8 Hen. V ; as the petition is addressed to the Archbishop of York, it must have come up later than this. John Kempe was made chancellor and Archbishop of York in 1426, and retained the office till 1432. The case therefore would seem to fall between those two dates. Kempe was again made chancellor in 1450, and it is possible that this petition came up in his second chancellorship. However, as that would imply a very great delay in bringing the case up, the first date is taken as preferable.

#### Bundle VII, No. 112.

A mon Reverend piere en dieu l'ercevesque D'everwyk chaunceller  
D'engleterre.

**Date uncertain.** Supplie tres humblement John Goldsmyth de Melton Moubray, marchand, que come il eit vendu a un William Sakes, servant et Chapman a John Trewe de Colchestre, marchant, troys quarts et demy de wood al oeps et profyt de mesme le John Trewe pur un certain some apaierz au certain iour, et fuist ensy, gracious Segnur, que a les iours de paiement du dit some assignez le dit suppliant venoit au dit John Trewe pur demander son paiement, le quel John Trewe, ymaginant de defrauder le dit suppliant de son dit paiement, disoit que son dit servant n'avoit acchatee de luy synon deux quarts et demy de wood et le quell unquore fuist sy malveys et feble que ne fuist de tiel value sicome le dit William l'avoit achate, la ou en fait et loialte il avoit troys quarts et demy sicome il sera duement

par sufficientz lettres testimonialx provee, et ensy le dit suppliant est forbarre et delaie de sa monie et est verrayseble d'estre mys a graund damage et perde saunz vostre gracious eide et socour celle partie : Que please a vostre tres reverend paternite de considerer les premises et coment le dit suppliant a cause q'il n'ad ascun especialtee des premises est par le dit John Trewe celle partie estre decieu et sur ceo de vostre benigne grace grauntier deux briefs directz as ditz John Trewe et William d'estre devant vous au certain iour sur certain peyne d'estre examine sur la matiere avantdite et par leur examinacion de faire que droit et reason demaudent, en oevere de charitee.

Plegii de proseguendo :

Henr' Roos, clericus.

Reg' Sharp de Melton.

### Bundle VII, No. 250.

A tres reverent piere en dieu et mon tres gracious Segnur L'erchevesqz d'everwyk et Chaunceller D'englitere.

Supplie humblement Robert Craunford, que come accorde soy prist parentre luy d'un part, et John Drayton et John son fitz d'autre part, cestassavoir a Aldurmeston en le counte de Worcestre le xxiiij<sup>e</sup> iour de septembr l'an du reigne nostre Segnur le Roy q'ore est quinte, que le dit John fitz John avoit et prendroit a femme Anne file a dit Robert et que deinz un moys apres les espousailles et mariage issint parentre eux faitz le dit John Drayton ferroit astat as ditz John fitz John et Anne des teres et tenementz a la value de xx marcz par an outre lez reprenez deinz le maner de Botilbrigge en le Counte de Huntyngden et Craunford en le Counte de Northampton, a avoir et tenir lez dites teres et tenementz issint a la value de xx marcz par an as ditz John fitz John et Anne et a les heirs de lour deux corps engendrez ; pur cause de quel accorde la mariage soy prist parentre lez ditz John fitz John et Anne, et puis le dit John fitz John [avoit]<sup>1</sup> issue parentre luy et mesme cesty Anne et morust, le dit estat nient fait, nient contristeant que le dit John Drayton a ceo faire sovent foitz ad este requis par les ditz Robert et Anne, a graunde damage du dit Robert et autres : Please a vostre gracious Segnurie deconsiderer (*sic*) lez premisses et que le dit suppliant n'ad mye remedie en celle partie par la comune ley et sur ceo de grauntier un brief sur certain notable peyne a dit John Drayton direct de comparier devant

After  
1426.

<sup>1</sup> Hole in document.

vous a certain iour par vous alimiter en la chauncerie nostre Segnur le Roy al fyn pur illeoques estre examine de et sur les premisses, issint que reme die ent soit fait a dit suppliant solonc ceo que reson et concience demaudent, Et ceo pur dieu et en oeuvre de charite.<sup>1</sup>

**Bundle IX, No. 132.**

To the right worchipfull fader in god Bisshop of Bathe  
Chaunceller of England.

1439 to  
1440.

Beseches mekely your pouer bedeman John Osgodby of London, Brewer, forasmoche as ther was a mater in debate by twyx John Kyffawe, Wodemonger, and Thomas Langley of London, Botelmaker, for the wheche mater were chosen arbitros ov bothe parties and eyther party bounden to other in obligacions of xx li., the wheche obligacions were delivert to the arbitros; and after thus come the said John Kyffawe, the too party, to your said besecher by asotelte and asked hym where was the obligacion, and your said besecher shewed yt to hym; and whenne he hadde yt he held yt and wolnot gyffe yt agayne; and your said besecher toke accions of detenue and detenue (*sic*) and canne have no recovere by lawe, and thus your said besecher ys lykly to pay this obligacion of xx li., w<sup>t</sup> outen your gracious lordship or remedy to be putte on hys behalf: Wherefore lyke yt to your gracious lordship to consider this mater aforesaid and to graunte a wrytte under certeyn payn directe to the said Thomas<sup>2</sup> that he may apere afore yowe in the Chauncery atte certain day by yowe alymed and therto be examined afore yowe and thenne to reule the mater aforesaid as lawe and conciens wolle, for the love of god and yn the way of charite.

*Endorsed:* Memorandum quod quinto die Novembris anno regni Regis Henrici sexti decimo septimo, Willielmus Staynford de London, Gentilman, et Iohannes Alkyn de London, Gentilman, coram dicto domino Rege in Cancellaria sua, personaliter constituti manuceperunt pro Iohanne Osgodby, videlicet uterque eorum, quod in casu quo ipse materiam in hac supplicacione specificatam veram probare non poterit, tunc prefato Thome Langley omnia dampna et expensas que ipse ea occasione sustinebit eidem Thome satisfacient iuxta formam statuti in hac parte editi et promisi.

<sup>1</sup> There is a short endorsement, but it is too faint to be legible.

<sup>2</sup> At first sight this appears to be a mistake for 'John'; Thomas, however, is the party mentioned in the endorsement, so the presumption is that he got hold of the obligation.

## Bundle IX, No. 206.

To þ<sup>e</sup> ryght gracious Lord þ<sup>e</sup> Chaunceller of England.

Besecheth ful humbly Richard ap Howell þat where as William, 1440 (?).  
Priour of þ<sup>e</sup> cherche of Seint Cuthlace of Hereford, late be his  
Covent seall let to ferme to on Leonard Holand his manere of  
Prioures Frome wyth þappourtenances for a certain some yeerly to  
be paied to þ<sup>e</sup> seyde Priour and his successours and under oper  
certain condicions comprehended in an endenture between hem made  
as in þ<sup>e</sup> seid endenture it is comprehended more plainly þ<sup>e</sup> whiche  
Leonard after þ<sup>e</sup> same lees made unto hym, lete over þ<sup>e</sup> same manior  
to þ<sup>e</sup> seid suppliant be his lettre sealed under þ<sup>e</sup> conditions abovesaid  
be vertue of which latter lees þ<sup>e</sup> seid suppliant entred and occupied  
and whenne þ<sup>e</sup> seid suppliant hadde sown gret part of þ<sup>e</sup> landes of  
þ<sup>e</sup> seid manoir and done þere upon gret husbondrye þ<sup>e</sup> seid priour  
and Leonard ymaginyng to putte þ<sup>e</sup> seyde suppliant fro his ferme  
entretyd þ<sup>e</sup> seid suppliant to leve þ<sup>e</sup> terme þat he hadde in þ<sup>e</sup> seid  
ferme and for þat so to be leved graunted be word þat þ<sup>e</sup> seid sup-  
pliant shulde have all þ<sup>e</sup> cornes growyng on þ<sup>e</sup> same manoir frely to  
þ<sup>e</sup> which þ<sup>e</sup> seid suppliant agreed hym and upon þys delivered to þ<sup>e</sup>  
seid Priour by þadvys of þ<sup>e</sup> seyde Leonard as well þ<sup>e</sup> endenture made  
to þ<sup>e</sup> seyde Leonard be þ<sup>e</sup> seid Priour and convent as þendenture  
made be þ<sup>e</sup> same Leonard un to þ<sup>e</sup> seid suppliant, þ<sup>e</sup> seid priour  
seyng boþe þendentures þus delivered un to hym wolde not suffre þ<sup>e</sup>  
seid suppliant to have þ<sup>e</sup> seid cornes aftyr þere seid covenant but  
hath takyn hem to hys owne oeps to þ<sup>e</sup> grete hurt of þ<sup>e</sup> seid suppliant  
in þis partie: That it plesse un to youre gracious lordshippe to con-  
sidere how þ<sup>e</sup> seid suppliant hath no remedie at þ<sup>e</sup> comon lawe an  
þere upon to graunte certain wryttes directid to þ<sup>e</sup> seid priour and  
Leonard to be before you at a certain day to be examined of þ<sup>e</sup> mater  
above seid and þere upon to do as consience and lawe wolde for þ<sup>e</sup>  
love of god and in þ<sup>e</sup> wey of charite.

Plegii de proseguendo :

Willielmus Watkyns de com' Buk', Gentilman.

Johannes Marchant de London, Gentilman.

*Endorsed*<sup>1</sup>: Memorandum Haec billa excerpta fuit ex bundello  
brevium in Cancellaria de A<sup>o</sup> 1<sup>mo</sup> H. 6<sup>th</sup>.

<sup>1</sup> Written on the back of the petition in a large hand ; obviously a later  
addition.

## Bundle IX, No. 335.

To hise fulgracious Lord the Chaunceller of England.

After  
1432.

Rightmekely (*sic*) besechith Rauf Bellers that for as moche as William Harper of Mancestre and Richard Barbour weren endetted to the seyde Rauf in certain sumes of mone withoute specialte to be payed unto the seyde Rauf or to hise certain attorne at certain dayes past at the wheche dayes and longe aftir the seyde William and Richard weren required by the seyde Rauf to make hym payment of the seyde sumes, to the wheche request the seyde William and Richard wolde not obeie in any wyse soo that the seyde Rauf, considering that þ<sup>e</sup> seyde William and Richard wolde make hor lawe in that partie agens faithe and good conscience, sued to the Archebisshop of Yorke, at that tyme chaunceller of England, for remedie in that caas, apon the wheche suggestion the seyde chaunceller graunted under certain payne writtes severally direct unto þ<sup>e</sup> seyde William and Richard to aperc afore hym in the chauncery there to be examyned apon the seyde matere; by force of that oon of the seyde writtes the seyd Richard apered in the seyde chauncerie and there agreed with the seyd suppliant and the seyd William myght nat befande soo that the writ direct unto hym stode in none effect: wherefore liketh youre gracious lordeship to graunte a writ under a certain payn direct to the seyd William to aper afore yowe in the chauncerie there to be examyned apon the matere aforeseyd for goddis luf and in werk of charite.

## Bundle IX, No. 382.

To my full gracious Lord the Bysshop of Bath and Welles and Chaunceller of Ingland.

1442 to  
1443.

Prayeth and mekely beseceth youre povere oratour William Parkoure, that whare the same suppliant and one Gilbert Bedenall of Benerley in the counte of York, Mercer, hadde theyr comon silver and golde in Mercerware to the price and value of xl S. and more pakked in fotepak and in hors pak to be demenet and reulet be adviss and labour of the sayd Suppliant unto theyr bother oeps sex yer to geder, that is to say fro the sevent yer of oure soveraigne Lord now beyng unto the xiiij yer of the same oure soveraigne Lord, with in whiche tyme of sex yer the same Gilbert had by thadvise (*sic*) and labour abovesaid all thencresse (*sic*) of the said silver and gode provenaunt, that is to say xxxiiij li., and the said Suppliant no part

ne none cane gete by the comon lawe, whare by their coveuant he shuld have the half : Wharefore lyke it unto youre graciouse lordship to graunte unto the said Suppliant a writte upon a certeyn peyn directe unto the same Gilbert to apper be fore yowe in the Chauncery of oure seid sovereigne lord at a certeyn day by yowe to be lymite to have and do in the maters abovesaid as gode treuth and conscience will, for goddes love and in way of charite.

*Endorsed*: Memorandum quod, sexto die Novembris Anno regni Regis Henrici sexti vicesimo, Henricus Thwaytes et Iohannes Muston coram prefato domino Rege in cancellaria sua personaliter constituti, manuceperunt, videlicet uterque eorum, pro Willielmo Parkour, quod, si ipse materiam in hac supplicacione specificatam veram probare non poterit, tunc predictus Willielmus (*sic*) prefato Gilberto pro omnibus dampnis et expensis que in hac parte sustentabit satisfaciet, iuxta formam statuti inde editi et promisi.

#### Bundle IX, No. 405.

Suppleaunt a vous umblement vostre povre oratour Richard Cordie, que come Thomas Rose vendit a luy un Mese, xl acres de terre, pur C marces de argent, des que C marces lxx marces furent paieez a luy et pur lez autres xx li. le dit Richard fuist tenuz al dit Thomas en un obligacion apaier a luy all iour comprise deinz mesme le obligacion ; par force de quele le dit Thomas enfessa le dit Richard par un fait de fessement de lez ditz mese et terre a avoir et tenir a luy et a ses heirz a toutz iours, et oblige luy et cez heirez a garrant all dit Richard et sez heires a toutz iourz ; par lou graunde parcell de lez dit Mese et terre fuist tenuz en villenage par cause de quele Seignur de le dit terre ad ouste le dite Richard et le dit Thomas sue le dit Richard pur lez ditz xx li. comprise deinz le obligacion, sur quele grevaunce le dit Richard n'ad mie remidie al le comune ley : pur que plesit a vous de graunter un sub pena d'estre direct al dit Thomas d'aperer devaunt vous en le chauncerie all certain iour par vous limitez de estre examinez sur lez ditz maters, en honour de dieu et par voie de charite.

1440 to  
1441.

*Endorsed*: Memorandum quod vicesimo nono die Iunij Anno regni Regis Henrici sexti decimo octavo, Iohannes Dentard de villa Westm', yoman, et Willielmus Rous de Nenton in com' Surr', husbondman, coram dicto domino Rege in cancellaria sua personaliter constituti manuceperunt videlicet uterque eorum pro prefato Ricardo quod in casu quo ipse materiam in hac supplicacione specificatam veram

probare non poterit, tunc prefato Thome omnia dampna et expensas qua ipsa occasione sustinebit satisfaciet (*sic*) iuxta formam statuti inde editi et promisi, &c.

**Bundle X, No. 17.**

A tresreverent pier en dieu l'evesque de Bathe son tresgracous  
Segnur.

After 1432. Supplie humblement John Polyng, Qe come un Symon Blaundell apprompta de ly xx li. et ly bailla ij obligacons, un par le quell un Ric' Webber fuit oblige al dit Symon en ix li., l'autre par le quell un Thomas Trevily fuit oblige al dit Symon en vij li., de recevoir lez sommes en iceux contenus en payement et satisfaccon pur l'affierant de lez ditz xx li.; a le quel payement lez ditz Ric' et Thomas al request du dit Symon agreerunt; puis le dit Symon morust intestat sauns ascuns biens aver, puis le dit Ric' fist un Isabell, sa femme, son excecatrix et morust, quell Isabell puis prist a baron un Ric' Medros; Et sovent puis le dit suppliant ad requys lez ditz Thomas, Ric' Medros et Isabell de lez payer lez ditz dettes a eux proferant lez ditz obligacions et eux, veiantz que le dit suppliant ne puit aucun accon avoir vers eux a le comyn ley, ne voillent ly payer, a grant anyntysment du dit suppliant s'il n'eit vostre tresgracous eide: Pleise a vostre tresgracous Segnurie de considerer les premysses et de graunter al dit suppliant ij breves, un d'eux directe al dit Thomas, et l'auter as ditz Ric' Medros et Isabell sa femme, de comparer devant vous a un certeyn iour sur un certeyn peyne par vous a lymyter d'estre examinees sur lez premysses et d'ent faire droit solonc vostre tres graciosus discrecon pur dieu et en oeuvre de charytee.

**Bundle X, No. 207.**

To my ful graciouse lord the bysshop of Bathe chaunceller of  
England.

After 1432. Mekely beseke unto your graciouse lordship John Derehill of the shire of Cornwaill for as muche as the said beseke, atte the Instaunce and prayer of on William Bampton of the said Shire, yoman, And opon ful promesse to kepe hym harmelese, was bounden with the said William unto on Nicholas late Abbot of Newenham in the counte of Devonshire in an obligacon of a C mark to be paied atte a certain day conteyned in the said obligacon; Whereuppon on Tristram now

abbot of the said abbaye be covyn and assent of the said William suyth and vexit your said beseker with divers writtes in the said counte and putte him to grete vexacion an coste for the said somme, to the undoyng of your said beseker in lasse than hit be remedied by youre graciouse lordship: Please hit unto your good grace to graunt a writte sub pena direct to the said William atte ascertain (*sic*) day and opon a certain somme by youe alimited to a piere a fore your graciouse presence, and after due examinacion had to fynde your said beseker sufficient suirte to kepe him harmlese agains the said abbot as he promised the said beseker, as reson and conscience woll after your highe and graciouse discrecon, For þe love of god and in Werk of Charite.

**Bundle XI, No. 8 a.**

To the full gracious fader in god Bisshop of Bath and Chaunceller of Ingland.<sup>1</sup>

Besechith mekely un to your gracious Lordship John Barnesby parson of the chirche of Slapton in the Counte of Norhampton, that where as the seide parson let his chirche to oon William Chacombe of Toucestre for the terme of thre yere of grete trist with oute any specialte and for as muche as the first two yeres were of grete derth and the thirde yere waxed grete chepe the seide William, seyng his avayle not so grete in the third yere os he had in the two yeres be fore, Also he seyng that your seide Besecher had no wrytyng to ground hym apon at the comyn lawe to conceyve any accion by and so with oute remedie, refusid to hold the third yere to the grete losse and harme of your seide Besecher the yerely value: Wherfor, please it to your full gracious Lordship to consider the mater above seide and there apon to graunte a writ sub pena directe un to the seide William to appere be fore you at a certeyn day under a certeyne peyne by you alymet and ther to be examyned of seide mater as concience will for the love of god and be way of charite.

Plegii de prosequendo:

Willielmus Asshely.

Johannes Reynolds.

After  
1432.

<sup>1</sup> Bundle XI, No. 8, is a copy of this petition, but it is not addressed to any particular Chancellor, and the 'pledges' are omitted.

**Bundle XI, No. 47.**

To my ful gracious Lorde bysshop of Bathe Chaunceller of  
Engelond.

After  
1432.

Besechith mekely un to youre gracious lordship youre pouer  
servaunt John Leomyster, one of the Clerkes of the Chauncery, that  
where one Thomas of Oclee of Erlygham in the Counte of Gloucestre,  
Squyer, oweth to Robert Manfeld of Gynes x mark, the which x mark  
was assyned be the seyde Robert Manfeld in recorde of the Mayre of  
Caleys for to be payed to youre seyde suppliaunt for certeyn money  
that the seyde Robert Maunfeld owed to hym; the seyde Thomas  
of Oclee, late beyng at London, a fore worthy men knowleged the  
dewete and payment ther of to be made to youre seyde suppliaunt,  
the whiche he utterly seth hathe refused: Wherefore please hit un to  
youre lordship to consider thys mater and ther upon of youre grace  
to graunte the seyde suppliaunt a Sub pena direct un to the seyde  
Thomas of Oclee, to appere a fore yow at a certeyn day and to be  
examyned of this mater abovesayd and as ye may fynde be examina-  
cion to remedy hit aftur youre discrecion, for the love of godde and  
in wey of charitee.

Plegii de prosequendo:

Thomas Asshecombe.

Johannes Halle.

**Bundle XI, No. 160.**

To the right Reverent Fader in God the bisshop of Bathe  
Chanceler of England.

After  
1432.

Humely (*sic*) besechith youre poure Oratour John Pottok that  
where he solde certeyns goodis and catalles to Harry Brome be the  
handes of oone Margrete Wylton for x li. For the which the sayd  
Harry was bound in an obligacion to your sayd besecher, the whiche  
sayd Margrete lost the forsayd obligacion: That it please to your  
gracious lordship consciensly to consider the premyse and [that]<sup>1</sup> your  
sayd besecher be cause that the sayd obligacion is loste hath noo  
remedie atte the comune lawe to recover the sayd some and over that  
of your good and gracious lordshyp to graunt your sayd besecher  
a writte under a certeyne peyne agenst the sayd Harry to apeyr in

<sup>1</sup> Hole in document.

the Chauncerye at the xv<sup>m</sup> of Pasch' that next comyth, there to fore yow to be examyned upon the sayd mater as right and consciens requiren at the Reverence of godd and in weye of Charitee.

Plegii de prosequendo :

Hugo atte Water.

Johannes Corff.

**Bundle XI, No. 427 a.**

To the ryght reverent fadur in god Byssshop of Bathe Chaunceller of England.<sup>1</sup>

Mekely beseketh youre pore bedman Thomas Baby, Prest, that where as youre seid Suppliant delivered certein godes of grete trust to on John Bramfeld of London, Prest, and therupon borrowed XX. S. to be paid agen atte certeine day be twene hem acorded, atte whiche day youre seid Suppliant come and paid to the seid John the seid XX. S. and required the seid John to deliver hym the seid godes ; and the seid John aftur the seid payment ensured youre seid suppliant on faith and on his pristhode [to] delyver the seid godes on the morow, and in the mene tyme the seid John solde away the seid godes to a straunge man in grete disseit to youre seid Suppliant and to that entent that yef he toke an accon of detenu agene the seid John that he myght have come in and waged his lawe ; and so your sayd Suppliant shuld be withoute remedie in grete hyndryng to hym withoute your speciall grace in this mater had : Wherfor, plese hit un to youre high grace to consydre these premysses and in relevyng of youre seid Suppliant to graunt a wryt directe to the seid John to aper a for you atte a certein day in the chauncerie under a certein peyne by you lymyted, there to be examyned of this mater as trouth and cociens (*sic*) woll, for the love of God and in the wey of charite.

After  
1432.

*Endorsed:* Memorandum quod tam infrascriptus Thomas quam infrascriptus Iohannes pretextu cuiusdam brevis domini Regis eidem Iohanni directi et in Cancellaria eiusdem domini Regis ad diem in eodem breve contentum ad respondendum super hiis que sibi per petitionem istam ad persecutionem predicto Thome obicerent, ibidem personaliter comparuerunt. Qua quidem petitione in Cancellaria predicta in presentia parcium predictarum lecta, ac materia in eadem nec non responsionibus et replicacionibus utriusque parcium illarum

<sup>1</sup> Bundle XI, Nos. 427 b, 427 c, 427 d, are copies of this pleading, and are substantially the same except that they are not endorsed with judgement.

pro iure suo in hac parte probando plenius auditis et intellectis, consideratum fuit per curiam Cancellarie predictæ quod predictus Thomas recuperet bona infrascripta, videlicet unam murræ et quatuordecim solidos et octo denarios pro sex coclearibus parcell bonorum predictorum.

**Bundle XII, No. 201.**

A tres reverent Segnur l'evesque de Bathe et de Welles  
Chaunceller D'engleterre.

After  
1432.

Supplie humblement vostre povre oratour Richard Pers, que come John Alewent et Thomas Fylder, servantz le dit Richard en son service esteantz en alant en sez bosoignes hors de la meere, par dyvers enemyez nostre Segnur le Roy furent sur la meere prisez ensemblement ove autres bienz le dit suppliant et cariez en la Mounte de Seynt Michell et illoqs raunsome a xl marcz ; a cause de quele le dit suppliant vient a un William Becche et ovesque luy accorda qu'il duist delyveres lez ditz prisons hors del dit prison, A cause de quele le dit William preist del dit Suppliant xl marcz, et nient [obsteant]<sup>1</sup> le dit William riens a ceo fist, par qi lez ditz prisons, pur ceo que lour raunsom ne vient a iour a eux limite, furent graundement distressez, stokkes et malement tresetes, issint q'ils furent en despeire de lour viez, a final destruccon des ditz prisons et a graund anientissement le dit suppliant, saunz vostre tres gracious eide et socour : Que please a vostre tres gracious Segnurie de considerer lez premisses et coment le dit Suppliant n'ad mye remedie solonque la cours del Comune ley et sur ceo de grauntier al dit Suppliant bref de sub pena direct al dit William d'estre examine devaunt vous de lez premisses a certain iour par vous limitez et sur ceo faire solonque ceo que bon foy et concience demaunde, Et ceo pur dieu et en overe du charite.

Plegii de proseguendo :

Edwardus Mills.

Johannes Boteler.

**Bundle XIV, No. 5.**

To the most reverent Fader in God John Erchbysshop of  
Caunterbury Chauncellere of Englund.

1443 to  
1450.

Besechuth humbully youre pore and contynuell oratoure, Conrade Goldsmyth, that where oon Laurence Walkere the Saturday next byfore the Fest of the Purification of oure lady, the yere of the regne

<sup>1</sup> Hole in document.

of the Kyng oure sovereyne lord, that is to say Kyng Harry the Sixte, aftur the conquest xxj<sup>e</sup>, att Teukesbury bought of youre seide besechere ij clothes and half of blankett for vij li. to be payode to the same besechere in the Fest of the Anunciacon of oure lady thenne next sewyng, for whiche payement as woll and trewely to be made oon Symkyn Bakere of Teukesbury undurtoke and bykome borowe for the seide Laurence, in as muche as the seide supliant wold nothur have solde nor delyverode the seide clothe un to the seide Laurence butt only uppon trust of the seide Symkyn and that he wolde undurtake for . . .<sup>1</sup> payement of the seide sume which he feythfully promyttode un to the seide supliant that he schulde be satisfiode and payode ther of atte his day, of which sume remayneth yett iij li. un payode which nothur the seide Laurence nor the seide Symkyn yett hathe satisfiode nor payode un to youre seide besecher; and the seide Laurence is wythdrawen and dyssnode<sup>2</sup> to strange places unknowen so that youre seide besechere may noo remedye have agenst hym thaughe he sewe hym by wrytte nor agenst the seide Symkyn by the cours of the comyn lawe: Pleasith youre gracious Lordship to consyder these premisses and ther uppon to do the seide Conrade to have dewe remedy agenest the seide Symkyn, for the love of God and in Wey of Charyte.

Plegii de proseguendo :

Ricardus Bury de Solbe in Com' Glouc'.

Henricus Wakfeld de Camden in eadem Com'.

### Bundle XV, No. 20 a.

To the ryght worchipfull fader in god the Erchebyssshop of  
Canterbury and Chaunceller of Ingland.

Besechith mekely youre servauntz and continuell oratours, Sir William Drury, Knight, and Johane his doughter, lathe the wyfe of Robert Aysshefeld the yonger, that, where as accorde was hadde be twen the seid William and Robert Aysshefelde, Squyer, the older, that the seid Robert Aysshefeld the yonger, sone to the seid Robert Aysshefeld the elder, shulde wedde the seid Johane, doughter of youre seid suppliaunt, and the seid Robert Aysshefeld the fader shulde do lawful estat to be made of alle his meses, londes and tenementz in the townes of Michel Yernemouthe and Southton to

After  
1432.

<sup>1</sup> Hole in document.

<sup>2</sup> The word is uncertain.

the seid Robert the sone and Johane and to the heirs of the seid Robert the sone of the body of the seid Johane be gotyn, and that the seid Robert the sone and Johane his wyfe shulde be made suer in lawe of a yerely rente of x marcs to take in the maner of Lytylhawe duryng the lyve of the seid Robert the fader, and also that the seid Robert the sone and Johane shulde be made suer be the seid Robert the fader and his feffes of the seid maner in Lytylhawe to have it after the decesse of the seid Robert the fader to the seid Robert the sone and Johane and to heys of Robert the sone of the body of the seid Johane be gotyn ; wheche Robert the fader be cause the same maner is helde of the kyng in chief, sued a licence that he myghte of the same maner enfeffe Hug' Bekenham and Water Gerard en fee, and that thei ther of myghte make estat a geyn to the seid Robert the fader terme of his lyve, the remaindre ther of to the seid Robert the sone and Johane in the some a bove seid, as in the seid license more pleynly apereth, and ther of made estate to the same Hug' and Water to the same entent ; for the whech mariage and estates to be made your seid suppliaunt, William Drury shulde paie to the seid

Robert the fader viij x marcs, wher of the seid William hath paied a gret parte and the residue he muste content at the dayes assignad ; and nout wythstandyng that the seid mariage was finished and day a poynted at twene theme of the seid estates to be made, for as muche as it happed the seid Robert the sone to dye in the mene tyme, the seid Robert the fader wulde nout suffre the seid estates to be made accordyng to the acordes a bove seid : Please hit youre gracious Lordshippe to consedre these premisses and howe of this mater youre seid suppliauntes have no remedye atte Comone lawe, and theruppon to graunt to youre seid suppliauntes Writtes sub pena directe to the seid Robert Aysshefeld, Hug' and Water to appere a fore you atte a certeyn day under a certeyn peyne by you to be lymtyed, to be examened of these premisses and theruppon to rewle hem to make the seid estates acordynge to the seid accorde, as good feith and conscience requiren, atte the reverence of god and for charite.

Plegii de proseguendo :

Johannes Hervy de Lavenham, Gentilman.

Rogerus Brook de Bernaham, Gentilman.

*Note.*—For the defendant's answer see Bundle XV, No. 20 b.

**Bundle XV, No. 20 b.**

The answer of Hug' Bokenham and Water Bayard, Clerk, to the bille goven agens hem be Sir William, Knyght, and Jane his doughter, in þ<sup>e</sup> Chauncerye.

The seid Hug' and Water for answer seyn that they were eneffeyd in y<sup>e</sup> seid Maner of Lytelhaghe for discharge of suyrte of an obligacion in which þ<sup>e</sup> seid Hug' and Water were boundyn to the seid Sir William in xl marcs atte request of þ<sup>e</sup> seid Robert Assshfeld; And also to make estate of þ<sup>e</sup> seid Maner to þ<sup>e</sup> seid Robert Assshfeld terme of his lyfe withoutyn enpechement of wast, the remayndre thereof to Robert Assshfeld, his sone, and to Jane, doughter of the seid Sir William, accordyng to þ<sup>e</sup> licence, upon certeyn condicions, which were rehersyd attwyn them, of certeyn payments and suyrtees to be payed and made be þ<sup>e</sup> seid Sir William to þ<sup>e</sup> seid Robert Assshfeld, the fadir, be the fest of of (*sic*) lammesse last past; For þ<sup>e</sup> which þ<sup>e</sup> seid Sir William and Robert ben in controversie be bille here in this place, wherfore so that bothe parties can agree them that the condicions be parformyd, orell yf it can be provyd they be parformyd on the þ<sup>e</sup> (*sic*) said Sir William's part, that we may be saved harmless agens þ<sup>e</sup> said Robert Assshfeld and have lyvere of þ<sup>e</sup> seid obligacion, we be redy and at alle tymes shall be to make estate accordyng to the seid licence; wherfore we praye to be dismyssed oute of court withoure resonable costes.

*Note.*—Bundle XV, No. 21, is a petition addressed to the chancellor by the same complainants, but they pray for a 'sub pena Against Robert Assshfeld' alone. The petition sets up substantially the same facts, and concludes with the prayer that the chancellor '... rewle the saide Robert Assshfeld to do in seid mater as moche as he may do accordyng to the seid accord, as good feith and conscience requiren, atte the reverence of god and for charite'.

**Bundle XV, No. 52.**

Unto the ful reverent fader in God the Archbisshop of Caunterbury  
Chaunceller of Ingelond.

Besechen to your high lordship Thomas Acton, William de Lones, William Abraham, John Aleyn and Richard Hervy herby to consider that where thei hade C tonne Wyn w<sup>t</sup> other godes to the value of v C (i. e. 500) li. laded in a ship called the Mighell of Dertmouth comyng fro Burdeux toward London, the which wyn and godes were taken uppon the See by one Thomas de la Tere of Bretayne sithen

After  
1444

trewes hade bitwene our soverain lord þe king of Ingelond and the Duke of Bretayne, for the which wyn and godes your seid besechers sued a lettre undre the prive seall of our seid soverain lord directe to the same Duke to have her seid wyn and godes agein or elles an answer wherfore thei shuld nat be restored to hem ; And theruppon your seid besechers comoved w<sup>t</sup> an herande of armes to have delivered þe same lettre to þe seid Duke and from him to have brought to hem an answer ; ther come the fifte day of May in the yere of our soverain lord aforseid xxij in the parisshe of Seint Martin in the vynetrie of London one Robert Wenynghon by covyn of þe seid Thomas de la Tere and covenanted and undretoke to your seid besechers to deliver þe seid lettre and bryng in to þe seid parisshe a redy answer of þe same lettre fro the Duke aforseid atte fest of lamasse then next suyng, at which v day þe same Robert reseved the seid lettre and yet brought none answer to hem there of ; So that your seid besechers are nat restored to her wyn and godes bicause none answer is hade, to her harmes of M<sup>l</sup> li. ; and the seid Robert liath housed and herberwed þe same Thomas de la Tere takyng godes out of Bretayne for þe seid wyn and godes sithen the resceyt of the lettre aforseid : Wherfore please it to your gracious lordship, consideryng þe premisses aforseid, to graunte a writte upon a certain peyne directe to the seid Robert him comaundyng to appere afore you in the Chauncerie at a certain day by you limyt for to be examined and answer to þe mater afore rehersed and whether he hath delivered þe seid lettre or none and upon þe seid examinacon hade to content your seid besechers for her costes and damages and that for the love of god and in wey of charite.

*Note.*—The right-hand edge of this document is much worn; in fact the whole petition was difficult to decipher.

#### Bundle XV, No. 140 a.

To the moste reverent fader in god Archbysshop of Cantuar'  
Chaunceller of Englund.

After  
1443.

Humble besechith Hammond Sutton that where late hit was accorded and agreed by twix John Bussy, knyght, and your saide besecher, þat John, sone and heire apperaunte of the saide John Bussy, shuld wedde and take to wyff Agnes, doghter of your saide besecher ; For which maryagge so to be hadde and (*sic*) a sure estate of landez and tenementz of the yereley value of xx li. a boffe all charges

and reprints to be made by the saide John Bussy or other persones for hym to the saide John the sone and Agnes and heire heires of ther bodys comynge with in a moneth after the mariage made. Not with stondyng the saide John Bussy Knyght yite hath not made no suche astate of dyvers landez and tenementz to the saide John sone and Agnes after the Fourme of the saide accorde, bot yt to doo he utterly refuseth agenste all gude faith and consciens: Please hit to your right gracious lordeship to considre thez premisses and þat your saide besecher in this partye hath no remedy by the comune lawe, and ther uppon to graunte to hym a wryte directed to the saide John Bussy, Knyght, hym comaundyng to appere by fore yowe at a certayn day uppon a certayn payn by yowe to be lymeted, to be examined of this aforsaide and ther uppan to do and receyve þat gude fath and consiens requireth in this party, and he shall pray to gode for yowe.

Plegii de proseguendo :

Johannes Burton.

Ricardus Leek.

#### Bundle XV, No. 140 b.

This is the answer of Sir John Bussy, Knyght, unto þ<sup>e</sup> bill ageynes him in the chauncery be Hamond Sutton.

First the saide Sir John saith that the mater contened in the saide bill is not mater sufficient to pute hym to answer to, and if it be sufficient he says hit is mater determinable at the comen lawe; Neverþeles for the declaracon of the trowth of the mater he saith þat upon the tetry of the mariage betwix the saide John the son and Agnes, hit was agreede þat a ioyntoure of xx li. of lyfode shulde be made to þ<sup>e</sup> same John the son and Agnes and to þ<sup>e</sup> heires male of their ij bodyes begoton, for defaute of suche issue the remeigner to the Right heires of the saide Sir John Bussy: bot for asmyche as hit was doubted whether the saide lifelode were tailed to the saide Sir John Bussy and to the heires of his body comyng or no, hit was appoynted be the counsell of bothe parties, for perill of a remitter be cause the saide John the son was at that tyme far with in age, þat astate of the saide lifelode shulde be made to vj persons, iij at the denomination of the saide Sir John and iij at the denomination of the saide Hamonde, in fee simple and þat the same vj persons at þ<sup>e</sup>

full age of the saide John the son shulde make astate of the saide lifelode to the same John the son and Agnes and to the heires male of their ij bodyes comynge, the remeigner over in the forme as it is above saide: beforce (*sic*) of which accorde and appoyntement and accordyng to the same the saide Sir John Bussy made astate of xx li. of lyfelode to Thomas Savage, Clerk, John Langholme and William Percy, chosen be the same Hamond and to John Boure, Clerk, John Denton and Richard Byngham, chosen be the saide Sir John, in fee simple to performe the saide entent, be virtue of whiche astate the saide vj persons are seised at this day of the same lyfode in fee simple, with oute þat the saide Sir John and Hamond were acorded þat the same Sir John or other persons for hym shulde make any astate to the saide John the son and Agnes and to the heires of their ij bodyes comyng with in a moneth aftur the saide mariage made in the maner as it is supposed be the saide Hamond be his bill; and praith þat he may be dimissed and þat he may have his damage for his wronge vexacon.

#### Bundle XV, No. 141.

To the moste reverent Fader in gode Archbyssshop of Canterbury  
Chaunceller of Englund.

After  
1443.

Humble besechith Hamond Sutton, that wher late accorde of mariage toke be twix John Bussy, Knyght, and your saide besecher, that John, sone and heire of the saide John Bussy, shulde wedde and take to wyf Agnez, doughter of your saide besecher; For which mariage so to be hade and asure astate of landez and tenementz of the yerely value of xx li. aboff all chargez and reprysse to be made to the saide John Bussy to Thomas Savage, Clerk, John Langholm, William Percy, John Boure, Clerk, John Denton and Richard Byngham, to that intente that whan John the son of the saide John Bussy come to the agge of xxj yere þat þai shuld make astate of the saide landez and tenementz to the saide John son of the saide John Bussy and Agnez his wyf and to the heirez malles of ther bodez comyng, your saide besecher shuld pay to the saide John Bussy ij C and lx marces, of the which some the saide John Bussy is contented be youre saide besecher with owte any state maide to the saide personex so named Feffes of the saide landez and tenementz; Wheruppon your saide besecher suede agens the saide John Bussy afore the Kyng

in his chauncerie to have hade remedy in theiz premisses, uppon the which a trete was takyn be twix the saide partez be mediacion of William Stanlowe and other of theire Frendez to abyde the rewelle and ordinaunce of John Tailboys, Esquyer, Robert Sheffield, Thomas Fitz William and William Stanlowe of the mater a boffe specified, so that awarde made be hem in that partye shulde be wretyn and insealed under theire seelez of the saide arbitrures a fore the Quindecim of Seint Michell last passed, which arbitred and awarde be dede indented maide and ensealed under all their sellez excepte the seele of the saide William Stanlowe, the which be the excitacion procuring and styrring of the saide John Bussy and Kateryn his wyff hath refused to putte to his seelle to the indenture of the saide awarde to the intent þat the saide award shulde not be effectuell nor avaylleable in lawe, notwithstanding both the saide Hamond and John Bussy to the award and ordinaunce aforesaide hath pytte to þeir seelles, as it apperith of recorde and so remaneth the saide Feffement not execute, nor the saide award effectuell nor avaylleable in gret hurte to your saide besecher agens all gud fath, reson, and consiens: Please hit to your gracious Lordeschip to conside theiz premisses and theruppon to have the saide John Bussy to for yowe and to be examined þerof and of all the circumstance of the same and so to do dewe remedy and redresse theiz premisses to your saide besecher, as gud fath and consiens requireth. For the loffe of gode and in Wey of Charite.

[Plegii de proseguendo:]

Robertus Hawton.

Thomas Baylton.

#### Bundle XV, No. 181a.

To the right holy fader in god Archebyssshop of Caunterbury  
Chaunceller of Englund.

Besechith mekely youre humble servaunt, John Serle, that where as debate was betwene Richard Fortescu, John Silverlok of that part, Thomas Wollywrought and the saide besecher of the other part, of the right and title of the mesis, landes and tenementz that nywly were the right and possession of on John Braklee in Plympton erlys, Plymphome and Loghetorre, in the Countee of Devon, and after that by mediacon of frundis to bothe parties aforesaid the said Richard, John Silverlok, Thomas Wollywrought and the said besecher com-

After  
1438,

promitte ham to stande to the awarde, arbitrement and iugement of Sir John Fortescu, Knyght, and Water Burell by the said parties indifferently chosyn, of the title, right and possession of the said mesis, landes and tenementz; wherof the said arbitrours takyng on ham the charge of the said arbitrement, awarde and iugement, awardedde and demyd the thursday next after the fest of seint Peder de Advinclā, the yere of kyng Harry the sixt the xvj<sup>th</sup> yere at Plympton erlis in the said Countee, that the said Richard Fortescu and John Silverlok afore the fest of Seint Michell thenne next suyng after the said day of awarde, arbitrement and iugement sholde enfeffe the said Thomas and the said besecher to the use of the said besecher in a miese with apurtenaunce in the said Towne of Plympton erlis in the west part of the geldhalle of the said Towne to have and to hold to hem and to their heirs in fee to the use of the said besecher; whiche awarde, arbitrement and iugement the said John Silverlok for his part hath parformid and the said Richard hath not parformyd ne fulfilled the saide awarde, arbitrement and iugment, and utterly hath refusid and in to this tyme haldith the possession of the said mese with apurtenaunce to the dishereteson of the said besecher, withoute your gracious help and socour in this partie: Plese to your gracious Lordship to considere the premissis, that the said besecher hath no remedie by the comyn lawe, to graunte a wryt sub pena directid to the said Richard Fortescu to apere afore yowe in the Chauncerie of oure soverain lord at a certein day by yowe lymet and on a certeyne payne ther to be examynynd on the mater aforesaid and ther on to do as reson and consciens askith, at honour of god and foe (*sic*) charitee.

Plegii de prosequendo :

Johannes Heryng.

Willielmus Mychell.

#### Bundle XV, No. 181 b.

This is the answer of Richard Fortescu Esquyer to the bille of John Serle.

The said Richard seyth that the mater specefied in the said bille ys noo mater sufficient in lawe to putte hym to answer too; where fore he askeyth Juggement and prayith to be Dymysid oute of this Court Wyth hys resonable costes and damages, &c.

## Bundle XV, No. 181 c.

This ys the replicacon of John Serle to the answer of  
Richard Fortescu.

The said John seyth the mater specified in his bill in (*sic*) mater sufficient in lawe and mater determinable by this Court, to the whiche mater the seid Richard answereth nat, Wherefor he askyth iugement and prayth that he may have the effect of the seid bille.

## Bundle XVI, No. 386.

To the right reverent fader in god and our right gracious lord the  
Archiebischop of Cauntbury Chaunceller of Englund.

Mekely besechen your pore and continuell servantz Robert Harry of Bradstede and Isabelle his Wyfe, that where on William Shoeswell þ<sup>e</sup> yonger, fader unto þ<sup>e</sup> seide Isabelle, desired þ<sup>e</sup> seid Robert to wedde and take to wyfe þ<sup>e</sup> seide Isabelle and yf the seid Robert wolde so doo þ<sup>e</sup> forseid William promysed and graunted unto þ<sup>e</sup> seid Robert and Isabelle yn mariage xl marces yn money to be paide at Ester laste passid and on þat to deliver to þ<sup>e</sup> seid Robert and Isabelle goodes and catelles to þ<sup>e</sup> value of xl marces whiche þat on William Shoeswell þ<sup>e</sup> elther, fader unto þ<sup>e</sup> seid William Shoeswell þ<sup>e</sup> yonger, in his laste dayes delivered unto hym sauflly to kepe to þ<sup>e</sup> use of þ<sup>e</sup> seide Isabelle and to be delivered unto here assone as she were married ; And now hit is so þat þ<sup>e</sup> seid Robert hath wedded þ<sup>e</sup> same Isabelle and pereuppon he hath come to þ<sup>e</sup> seid William Shoeswell þ<sup>e</sup> yonger and requyred hym diverse tymes setthe þ<sup>e</sup> seid feste of Ester to fulfill his graunte and promysse and þ<sup>e</sup> seid William Shoeswell þ<sup>e</sup> yonger yn no wise will paye þ<sup>e</sup> seid xl marces neyther deliver þ<sup>e</sup> seid goodes and catelles after his promysse and þ<sup>e</sup> byqueste of þ<sup>e</sup> seid William Shoeswell his fader but atte þ<sup>e</sup> oepas of seint hillary laste passid afore þ<sup>e</sup> Justicee of þ<sup>e</sup> Comone place hath done his lawe yn a writte of dette by your seid besechers in þis partie sewed þat he owed your seid besechers no peny ne no suche goodes ne catelles pann withholdith where of your seid besechers have notable witnes and profes of þ<sup>e</sup> contrarie to þair grete hurte and losse for ever of þ<sup>e</sup> seid dette, goodes and catelles, wiþoute your gracious socour and helpe yn þis partie to þaim shewed : Plese hit unto your gracious lordship to consider þ<sup>e</sup> seid premysses and pereuppon to graunte unto your seid suppliantz a writte directed unto þe seid William Shoeswell to appere afore you in þ<sup>e</sup> Chauncellarie of our lord þ<sup>e</sup> kyng

Date  
uncertain.

atte a certain day and uppon a certeyne peyne by you to be lymyted there to answeere unto þ<sup>e</sup> seid premisses and þere mak hym do þat good feith, right and consience aske and require for þ<sup>e</sup> love of god and by way of charite, Consideryng þat your seid suppliantz ben wipoute remedie after þ<sup>e</sup> cours of þ<sup>e</sup> comone lawe, yn so moche as þei have no specialte to shewe for þaim yn þis partie.

Plegii de prosequendo :

Thomas Hever de com' Kent.

Robertus Parler de Brastede.

**Bundle XVI, No. 412.**

To the ryght holy fadre in god and my goode lorde Archiebisshop of Canterbury and Chancellor of England.

**Date uncertain.** Besechith mekely your poure bedeman John Palgrave, That where the sayde John boght of on Cristain Gymbald certain londes and tenementes in the towne of Pesynhale in the shire of Suff<sup>r</sup> for sufficient record and for certaine sommes of money to be paiede to the saide Cristian att certain daies betwixte the saide parties lymyted ; And for be cause ther was no clerk nor lerned man there to make upp their dedes accordyng to the sayde covenantes, It was appointed and accordid betwixte the saide parties that att a certaine day by thaime assigned they shuld have mette and paied the furst paiement and made upp here dedes ; And noghtwithstondyng that this sayde bargan was sufficiently made [and of goode]<sup>1</sup> record and the sayde john was redy with the saide furst paiement att þe saide day, the sayde Cristian by styrryng of oother evill willid poeple (*sic*) refusith utterly the [saide]<sup>1</sup> bargain unto grete hynderyng of your saide besechiere without youre gracious lordship in this party : Wherfor please hit unto youre gracious lordship, consideryng that youre saide suppliant may have no remedy att the comune lawe, to graunte a write under a certaine paine directe unto the saide Cristian to appere afor you in the Chauncerye atte certaine day by you to be lymyted, there to be examyned uppon the mater aforsaid, he there to have and receyve that by youre gracious lordship shall be awarded in that partie, For the love of god and in Wey of charite.

Plegii de prosequendo :

...<sup>2</sup> Stapilton de villa Westm', yoman.

Johannes Ceyfi de villa Westm', Cordwaner.

<sup>1</sup> Hole in document.

<sup>2</sup> Illegible.

## Bundle XIX, No. 26.

To the most reverent fader in god and right gode and gracious lord  
the Archebisshop of York Cardynall and Chaunceller of Ingland.

Besechith mekely your poore Oratour John Carter of Beverley <sup>C</sup> 1450 to  
that where [he]<sup>1</sup> and Roger Kidall were possessed ioyntly of ix <sup>1454.</sup>  
Stockfisshes and an C <sup>xx</sup> Saltfisshes þ<sup>e</sup> which [were]<sup>1</sup> putte in to  
a hous to have ben uttered and sold to their bother use and profite  
Wheruppon the forseid Roger all the forsaid Stockfissh and Saltfisshe  
hath manured, occupied and putte unto sale and noon accompte nor  
profite therof, ner of any parcell therof, will yelde to your said  
Oratour, to his perpetuall undoyng withoute your full gracious lord-  
ship be to hym shewed in this behalf, for he may have no remedie  
by the Course of the comone lawe in this partee: Wherfor, those  
premisses tenderly considred, please it your gode gracious lordship  
to graunt a writte sub pena to be direct to the forseid Roger to appere  
afore the Kyng our soverayne lord in his Chauncerye at a certayn  
day by you to be lymitted there to be examyned of the premisses and  
theruppon to do as faith and conscience requireth, for the love of god  
and in the waye of charite.

Plegii de prosequendo:

Johannes Killyngholme.

Nichelaus Elys.

## Bundle XIX, No. 59.

To the most wurshippful and reverent fadir in god the Cardinall and  
Archebisshop of York Chaunceller of Ingland.

Besechith mekely your pour and continuell oratour John Mercer,  
that where as oon John Halsnoth was seysyd of a Meese and xvj  
acres of lond wythynne the Parysh of Cranebroke in his demesne as  
in fee and there of soo seysyd of gret fayth and trust enfeffid oon  
Simon Doreham and other to have and do (*sic*) hoold to theym and  
theyre heyres for evermore to the use and behoft of the seyde John  
Halsnoth and hys heyres, after whych feffement, accord and aggre-  
ment was had betwene your sayd Suppliaunt and the seyde John  
Halsnoth that your seyde suppliant shold have the sayd Mies and

After  
1450.

<sup>1</sup> Hole in document.

xvj acres of lond to hym and to hys heyres for evermore, And that the seyð Halsnoth shold require hys seyð feffez to make an astat to your seyð Suppliaunt and to such as he wold name wythynne a moneth next aftir the seyð accord ; for the which Mies and xvj acres your seyð Suppliaunt shold paye to the seyð John Halsnoth atte tyme of the makyng of the seyð astate xliij mark, wherof part is payd. And now gracious lord the seyð moneth and more is passyd and your seyð suppliaunt hath required the seyð feffes to make astat to hym accordyng to the seyð aggrement, the whych they all been redy for to doo except oonly the seyð Simon Doreham, With that the seyð John Halsnoth woold there to require hem ; and the seyð Simon Doreham seyeth that he hath bought the seyð Mies and xvj acres of lond of the seyð John Halsnoth to thentent (*sic*) to put your seyð Suppliaunt from his seyð bargayne, where of trowith the seyð Simon had never noo maner of covenant of the seyð londys and tenementes afore the seyð aggrement had bytwne your seyð Suppliaunt and the seyð Halsnoth, but oonly syn, how be it þat the seyð Simon had very knowyng of the seyð bargayn had betwene your seyð besecher and the seyð John Halsnoth long tyme byfor the seyð bargayn had bytwene the seyð Simon and John Halsnoth, the whych is agenst all reson, feyth and good concience : Wherefore please it youre good and gracious lordship tenderly to concider thyse premisses and that your seyð suppliaunt hath noo remedy atte the comyn lawe, to graunte to hym severall wryttes sub pena direct to the seyð John Halsnoth and Simon to appere atte a certeyn day be yow to be lymtyed and that the seyð John Halsnoth may be compellid to require his seyð feffez to make astat to your seyð Suppliaunt, and also that the seyð Simon may be compellid to make astat forth wyth his cofeffees to your seyð suppliaunt as good feyth and concience will for the love of god and in wey of charite.

Plegii de prosequendo :

Thomas Reynold de London, Gentilman.

Ricardus Richard de London, Grocer.

### Bundle XIX, No. 58.

This is the answere of John Halsnoth and Simon Durham agenst the bill of John Mercer in the kynges Chauncerye.

John Halsnoth and Simon Durham by protestacion seith that the mater in the seid bille comprehended is not sufficient in lawe for hem

to answer to whiche [they] praye that theire advantage there of alwey to be saved. Furpermore, where as the said John Mercer hath surmytted and aleyde by his seid bill that the said John Halsnothe shulde have be seised of a mees and xvj acres of lond within the paryssh of Cranebroke in his demene in fee and so seised of greet trust shuld have infeffed the said Simon Durham and other to the use of the said John Halsnoth and of his heires, after whiche feffement accorde and agreement shuld have be bytwene the said John Mercer and the said John Halsnothe þat youre seid suppliant shulde have the seid mees and xvj acres of lond to him and to his heires and that the said John Halsnothe shuld require his seid feffees to make estate to your seid suppliaunt at whiche tyme as he wold name within a moneth next after the said accord as in the said bill is conteyned ;

Therto the said John Halsnothe and Simon answer and seye for declaration of trouth that longe tyme afore that ever the said John had eny possession in the said mees and xvj acres of lond on John Robert of Cranebroke p<sup>e</sup> elder was seised perof in his demenes in fee whiche said John Robert in and of the said mees and xvj acres enfeffed the said John Halsnoth, Simon Durham and oþer to have to hem and to her heires forever, by vertue of whiche þey were perof seised ; whiche said Simon and oþer so beyng ioyntly seised with the saide John Halsnoth afterward into the possession of the said John Halsnothe by her dede releessed all her right title and clayme þat þey had perin in any wyse by vertue of the said feffement ; whiche said John Halsnoth perof so beyng soll seised sold the said mees and xvj acres to the said Simon Durham, by cause of which sale he infeffed perin the said Simon Durham and oþer to p<sup>e</sup> use and behoove of the said Simon and of his heires forever by vertue of whiche þey were perof so seised, withoute þat ever eny accord and agreement were made or had bitwene p<sup>e</sup> seid John Mercer and John Halsnoth for p<sup>e</sup> seid mees and land, and withoute þat the said Simon were ever enfeffed by the said John Halsnoth to his use in p<sup>e</sup> seid mees and land in maner and fourme as it is surmytted by p<sup>e</sup> seid bill ; which mater þey be redy to averr as þis Court will award, and prayen to be dismyssed oute of Court and her damages for their wrongfull vexacion.

## Bundle XIX, No. 57.

Thys ys the replication of John Mercer to the Answer of Simon Doreham and John Halsnoth.

Ther to the seid John Mercer seyth that, where as the seid Simon and John Halsnoth seyen that ther was never non accord and aggrement hadde betwene the seid John Mercer, Suppliant, and the seid John Halsnoth for the seid Mees and lond and that the seid Simon was never enfeffed by the seid John Halsnoth to his use in the seid Mies and lande in maner and fourme as it is surmittid, Therto the seid suppliant seith that ther was accord and aggrement hadde betwene the seid suppliant and the seid John Halsnoth for the seid Mies and land in maner and fourme as the seid suppliant hath surmitted by his bill, and that the seid suppliant gaf notys to the seid Simon Doreham of the said bargayn long tyme afore the seid John Halsnoth solde the seid Mies and land to the seid Dorham; the whiche matiers the seid suppliant ys redy for to prove as this Court will awarde; and in as moche as the seid Simon and John Halsnoth with seyen not that the seid Simon was enfeffed to the use of the seid John Halsnoth atte tyme of the Bargayn of the seid suppliant made and longtyme syn and that the seid Halsnoth hath resevid parte of the seid money by force of the seid Bargayn, the seid Suppliant prayeth that the seid John Halsnoth may be compellyd to make his feffeez to make estate to the seid besecher of the seid Mees and lond and that the seid Simon may be compellyd to make an astat in like wyse therof to the seid suppliant in maner and fourme, as the seid suppliant hath disyryd be his bill as good feith and concience requireth.

## Bundle XIX, No. 56.

Thys ys the reioinder of Symon Dyrham and John Halsnoth to the replicacon of John Mercer.

Where the seid John Mercer seith that ther was accord and aggrement hadde bytwene the seid John Mercer and the seid John Halsnoth for the seid meas and land as he hath surmetted by hys byll, Therto seith the seid Simon and John Halsnoth that ther was non accord ne aggrement had by twene the seid John Mercer and the seid John Halsnoth for the seid meas and land in maner and fourme as he hath allegged by hys bille, the whiche he ys a redy to averr as the Court will award. And also where as the seid John Mercer

surmetteth in hys replicacon that the seid Symon and John Halsnoth wythseyeth not that the seid Symon was enfeffed in the seid meas and lande to the use of the seid John Halsnoth, to the whiche the seyd Symon hath sufficiently answered ageinste the seid bill, And to the whiche the seid John Mercer hath not sufficiently replied, wherfor he prayeth that he may be dismyssed.

**Bundle XIX, No. 347.**

To the right reverent fadur in god Cardinall of Yorke Chaunceler of England.

Besechith lowly Richard Onehand of London, Draper, that where Johane, late the wyff of yon Etton, Squyer, owed un to your seid besecher ix li., on Phelypp Lewston labored to the frendes of the seid Johane to have her to wyff; which Johane agreed to have the seid Phelypp to housbond so that he wold pay your seid besecher the seid ix li. and also to pay the residue of her dettys of the seid Johane. And afterward the seid Phelypp came to your seid besecher and lett hym to have knowlege that he shuld be payed of the seid ix li., and promytted hym that he shuld be payed ther of with yn short tyme. Which Phelypp afterwarde wedded the seid Johane and after that tyme your seid besecher hath often tymes required the seid Phelypp to make hym payment of the seid ix li., which to do utterly he refuseth a genst alle good feith and Concyens: Wherefore pleaseth your gracious lordeshipp tenderly to consyder thes seid premysses and ther uppon to geve in comaundement to the seid Phelypp to a pere a fore [you] atte a certen day by you to be lymeted to aunswer to thes seid premysses and that he may be compelled to pay your seid besecher the seid ix li. as good feith and concyens requireth, for the love of god and in wey of charite.

After  
1450.

Plegii de prosequendo:

Robertus Blewet.

Thomas Staff.

**Bundle XIX, No. 346.**

This [is the] aunswer of Philip Leweston a genst the bille of Richard Onehand.

Where the seid Richard by his bille surmytteth that Johan, late the wyf of yon Etton, owed un to hym ix li., sche owed hym no peny, ne never was cause ne contracte by twyx them wher of eny dette

shuld growe [out]<sup>1</sup>; wher he aldith<sup>2</sup> that sche schold agre to take the seid Philip Leweston to husbond so that he wolde pay the seid Richard ix li., ther was never soche langage by twyx [the]m<sup>3</sup> ne y promytted hym never payment of thes ix li. as he surmyttith by his bille; and pray that y may be demysed owte of court and to have my damages amged<sup>4</sup> to me for his wrongfull vexacion, a cordyng to the statutes ther uppon ordered.

**Bundle XIX, No. 345.**

Memorandum, that Phelipp Lewston come to Ric' Onehandes Shopp in the parissch of Seynt Marie Lothawe in Walbroke Warde in London in the Monthe of Jule the date of our lorde M<sup>l</sup>CCCCxxviiij, the reign of kyng Henry the vj<sup>th</sup> xx<sup>th</sup>,<sup>5</sup> he promytted Ric' Onehand in presence of Alyson, his wife, ix li. for the deute of Johane, late the wife of Jon of Etton, to pay well and truly atte Ester twolf monthes after that promyse, by hie feith; and heruppon my wife and I will swere uppon the sacrement that this is true that we swere, and herupon will bryng Ric' Hyfeld, Thomas Herford, Harry Mesant, William Dodde, Thomas Godyng and Thomas Steven and xx<sup>th</sup> goode men mo to conferme this true that my wife and I will swere.

Also oon John Scot, apperyng in hys propre person in the kynges Chauncerie, seys upon hys sacrement that he ij yere nowe agone herd Phelip Leweston in Westmynster Hall sey to the seid Richard Onehand that the seid Richard Onehand was a foole on a day; for if ye hadde made obligacion as I bad you, y wolde have sealid it at that day and then ye shuld have be sekyr of your money.

**Bundle XIX, No. 354 a.**

Addressed to the Cardinal and Archbishop of York.

After 1450. The complainant, Robert Ellesmere of London, makes out the following case in his petition:

One William Serle of London came to him (i. e. the complainant), and said he had certain 'terms' (i. e. leases) of certain lands to sell of the value of £6 yearly. There was much discussion about this, and finally it was 'accorded' that complainant should come with

<sup>1</sup> Hole in document.

<sup>2</sup> i. e. 'ald', to hold; query perhaps 'aløith'.

<sup>3</sup> Hole in document.

<sup>4</sup> This word is uncertain.

<sup>5</sup> Evidently one of these dates is wrong; for 20 Hen. VI would be 1442.

counsel to Serle's house at a certain day to examine the evidence of title. Complainant went, examined the said evidence 'and liked þeym wele, . . . wherupon it was ful accorded and covenanted between þeim þat þe said Robert shulde have þe said termes for the summe of xl li. betwene þeim accorded, And þat at a certaine day þey shulde mete at a place lymited to ensele and delyver þe writing of þe said covaunt' at the payment of the said sum. The parties came to the place assigned and complainant offered payment and {demanded the sealing of the said writing and livery of the evidences. The defendant (William Serle) 'utterly' refused to seal the writing or to deliver the evidences, and still refuses, so that complainant has lost his bargain and is without remedy at law. He prays for a subpoena directed to the defendant, and general relief.

**Bundle XIX, No. 354 b.**

The defendant's answer.

The defendant says first that this case is not properly brought in chancery; for the complainant has a remedy at law, namely by an action of Covenant, which, says the defendant, is maintainable by custom of London without specialty.

Secondly, the defendant denies that there was ever such bargain or 'accorde' as the complainant has alleged in his petition.<sup>1</sup>

**Bundle XIX, No. 354 c.**

The complainant's replication.

In reply to the defendant's first contention, he says:

'Furst, where as the seid William seith that the custome of the Cite of London is and tyme with oute mynde hath ben, that accions of covaunt are and have been of the seid tyme maintainable with Inne the said Cite as well withoute specialte as with specialte, and seith that all bargaynyng as touchyng the seid termes of the same mees was hadde betwene him and the seid Robert with Inne the seid Cite, the which is mater determinable by an accion of covaunt with Inne the same Cite,

'Therto the seid Robert seith by protestacon that he knoweth noon suche custome with Inne the Cite of London, ne that the seid bargayne and covaunt was made with Inne the seid Cite, but he seith that, for asmoche as the seid William Serle hath confessed

<sup>1</sup> This document is in a very bad condition.

the same covenaut and bargayne as it appereth by his answeare, he asketh iuggement and prayeth that the same William may be compelled to make him astate.'

Complainant then replies to the rest of the defendant's answer.

**Bundle XIX, No. 354 d.**

This is the examinacion of John Cresswell, Squyer, upon the mater in the Chauncerie of oure soverayne lords the kynge betwyne Robert Ellesmere, Goldsmyth, and William Serle, Carpenter.

Firste, the saide John saith that he was presente whenne the saide Robert Ellesmere and the saide William Serle, as touchynge the termes comprehended withynne the bill of the saide Robert, were fully accorded, the whiche bargayne the saide William Serle rehersed to the said John Creswell, the wyfe of the saide William beyng presente, and by thassente (*sic*) of here they were fully appoynted and accorded that at oure lady day the Annunciacion, that last was, the saide Robert shulde come and have his bargayne and paye his money; at whiche tyme of the saide accorde, if the saide William and his wife wolde have saide nay, the saide Robert wolde have hold him plesed and not desired it. All whiche comunicacion the saide John Creswell herde and was presente; And pereupon they wente to the Swan beside Seynt Antonyes and there they dronke to gederes upon the saide bargayn atte the coste of the saide Robert Ellesmere; alle whiche mater be trewe and that he woll swere upon a boke.

This is the examynacion of David Gogh upon the saide mater.

David Gogh, examined upon a boke, saith that he was presente whenne the evydences touchynge pe saide termes was redde, and the saide Roger<sup>1</sup> asked on George Houton, a man of Counsell, reder of the saide evydences, wheder they were gode for hym other no, And the saide George avised the saide Robert to take the bargayn, saynge that the evidence was gode, and this the saide David herde, the saide John Creswell saynge, thanne ye be accorded, and the saide William Serle sayde, yea.

**Bundle XIX, No. 354 e.**

The trouth is this, that I, George Houton, was desired by Robert Ellesmere to goo and to have sight of the evidences of William Serle concernyng the bargeyn of certeyn termes of a mees of the same

<sup>1</sup> Query: for 'Robert'?

William that the seide Robert shulde bye and bargeyn of hym ; the whiche George hadd sight of the seid Evidences, understanding theym gode and sufficient, counseld the seid Robert the (*sic*) bargeyn the seide termex with the seide William, with that he myght conclude for a competent some of money ; the same Robert then desired to wete of me, the seid George, what some I wolde thynk were competent to be goven therfor ; I seide xxx li. were y nough and þen the seid Robert answered me and seide that he wolde geve xli. rather than leve the bargeyn, wheruppon the seid Robert comyned w<sup>t</sup> þe seid William and his wiff, þe seide George and oon John Creswell, stondyng by the same Creswell herkenyng better and more takhedē as at that tyme to the comynycacion between them then I, the seid George, did spake and seid un to them, then ye be accorded ; then I, the same George, geveng better Erys to their speche, desired to knowe howe they were accorded ; then seide the seid Robert, I shall geve a grete some of money ; what some I, the seid George, desired to wete and he answered me and seid, xli. and it most be purveyd agenst our lady day Annunciacion at whiche tyme it is accorded that the seid William shall delyver unto me, seide the same Robert, all the seid Evidences to geder w<sup>t</sup> other Evidences to be engrosed of the seid bargeyn ; and yet, seide the same Robert, I thank the godeman here, he puttyth me at my choyse whethir I woll have it or leve it at þe seid day ; then, seide I, the seide William be ye accordeth in the maner as Robert here hath rehersed and he seid, ye, Then goo We drynke ; and so We did unto the Swan, a brewehaus fast by Seynt Antoinnes and then departed, &c.

*Note.*—A further deposition (Bundle XIX, No. 354*f*) is omitted, as it does not contribute any additional information.

#### Bundle XIX, No. 404 *a*.

To the most reverent fader in god my good and gracious lord my lord the Cardynall of york Chaunceller of England.

Besecheth mekely your contynuell bedman John Isaak of Bourne in the Counte of Kent, that where as John Isaak, fader unto your said besecher nowē ded, by his lyve bought of oon Robert Bisshoppsdane and Johane his Wief ij acres of lond lyeng in the said toun of Bourne for a certeyn some of money which he payd weel and truly unto the said Robert and Johane, and whan he had payd þe money the said Robert and Johane agreed and made faithfull promyse unto hym to make a sufficient estate unto hym and to his

After  
1450.

heirs when he or his heirs wold theym þerto requyre, and thenne sone after dide aswell (*sic*) þe fader unto your said besecher as the said Robert, after whoos deeth your said besecher, sone and heir unto the said John, hathe dyverse tymes required the said Johane to make estate unto hym accordyng unto hir said promyse; the which to doo she utterly refuseth contrarie to all good feith and conscience: Wherefore plesse hit your goode lordshipp tenderly to conside the premysses and hou your said besecher may have noo remedy as by the comon lawe to graunt a writ of sub pena direct unto the said Johane to apere be fore the kyng in his Chauncerye at a certeyn day by you to be lymyted, there to be examyned uppon the premysses and to doo and resceyve as the Court wyll award, atte reverence of god and in wey of Charytee.

[Plegii de proseguendo:]

Johannes Doyle de Cantaur', Armig'.

Ricardus Pargate de eadem, Gent'.

**Bundle XIX, No. 404 b.**

This is the answer of Johanne Byschopysdane to the bille of John Isaake.

ffyrst she seith that she ouwyth not to answer to noo mater that is comprehendith in the bille of the seid John, but she seith for here answer that she never solde, concentyd, nothir agreed to no sale of the seid land whiche is conteyned in the bille of the seid John; Wherefore she prayeth to be dismyssed oute of court as faith and consciens requireth and that the seid John may satysfy here here costys for that he hath wrongfully vexithe here accordyng to the statut in suche case provydyd.

**Bundle XIX, No. 49a.**

To the most reverend Fader in god the Archibisshop of York Cardynall and Chaunceller of England.

1450 to  
1454.

Sheweth mekely to your gracious lordship Thomas Bodyn of London, that where accord and covenant was made betwene hym and one Robert Chirche, Citezin and Haberdassher of London, the xv<sup>th</sup> day of Feverere the yere of the reigne of King Henry the vj<sup>th</sup> after the conquest the xx<sup>th</sup>, be the medeacion of the frendez, beyng thenne your said suppliant with in age of xiiij yere, that he shuld be prentice to the said Robert in and of the crafte of haburdassher fro the Feste

of Alhalowen then last passed unto the yend of xij yere thenne next comyng, So alwey that the said Robert shuld fynd to scole at hys awen costes and charge the said Thomas duryng two the furst yeres of the said terme, that is to say a yere and half therof to lerne grammar and the resydue of the said two yeres, which amounteth to half a yere, to scole for to lerne to write, and theruppon the said Thomas by the advise of his frendez, trustyng to have be founde to schole in fourme aforsaid, graunted the same xv<sup>th</sup> day by dede indented thenne made betwene hym and the said Robert to be true Apprentice to the same Robert duryng the said terme of xij yere, of which terme of xij yere he hath contynued in the Service of the said Robert as his prentice in the said crafte from the said Feste of Alhalowen unto the yende of viij yere and more and often tymes in the bigynnyng of the same terme and mony tymes sithon the said Thomas with his frendes hath prayed and required the said Robert to putt and fynd hym to scole in fourme aforsaid after the effecte of the said covenaut and accorde, the which to doo the said Robert wolnot (*sic*), but that to doo at all tymes utturyly hath refused, to the grete hurte, harme and losse of the said Thomas : Please hit your good and graciouse lordship to consider the premisses and that the seid Thomas therof may have no remedy by the course of the comone lawe of this land, And theruppon to graunt a writte to be direct to the said Robert to appere by fore the kyng in his Chauncerie at a certeyn day and uppon anotable (*sic*) payne, by your gracious lordship to be lymyted, there to answeere and to doo and resceyve of and in thise premisses as by the Courte of the same Chauncerye thenne shall be ordeigned, and he shall pray to god for you.

**Bundle XIX, No. 493.**

This is the Answer of Robert Chirch agenst the bill of  
Thomas Bodyn.

Frist (*sic*) the seid Robert, by protestacion y<sup>t</sup> the mater in y<sup>e</sup> seid bill conteyned is not sufficient to put hym to answer in y<sup>ls</sup> courte, saith y<sup>t</sup> y<sup>e</sup> seid Endenture of Apprentice by y<sup>e</sup> which the seid Thomas was bounde to y<sup>e</sup> seid Robert with all y<sup>e</sup> circumstaunce y<sup>e</sup>of was made and had with in the Cite of London where by y<sup>e</sup> custom of the same Cite ane accon of covenaut ys mayntenable as well withoute Especialte as with Especialte, so y<sup>t</sup> yf eny sich covenaut of fyndyng at scole of the seid Thomas had be made and broken like as the seid

Thomas hath surmittyd, he myght yerof have had and yit may have covenable remydy by pleynt within y<sup>e</sup> seid Cite after the fourme and cours of the Comone law yere ; and foryermore, for y<sup>e</sup> more declaracon in y<sup>is</sup> mater, y<sup>e</sup> seid Robert seith y<sup>t</sup> nygh aboute the fest of all halowen the yer of the reign of our soveign lord y<sup>t</sup> [now is]<sup>1</sup> xix<sup>th</sup>, y<sup>e</sup> seid Thomas and Robert by y<sup>e</sup> mene of one Henry Wakefeld were agrede and Endentures yeruppon made, y<sup>t</sup> the same Thomas shuld be apprentice with y<sup>e</sup> seid Robert for y<sup>e</sup> terme of xij yere yen next folowyng so y<sup>t</sup> sufficient suerte were founde for the seid Thomas to be trewe apprentice with y<sup>e</sup> seid Robert duryng y<sup>e</sup> terme aforsayd ; Wherupon y<sup>e</sup> seid Thomas abode with y<sup>e</sup> seid Robert fro y<sup>t</sup> tyme unto y<sup>e</sup> terme of hillary y<sup>e</sup> xx<sup>th</sup> yer of y<sup>e</sup> seid kyng yen next cumyng and no suerte for the parte of y<sup>e</sup> seid Thomas by all y<sup>t</sup> tyme was founde, wherfor y<sup>e</sup> seid Robert at y<sup>t</sup> tyme was in full purpose no more to have had to do with y<sup>e</sup> seid Thomas in so myche y<sup>e</sup> y<sup>e</sup> (*sic*) seid Endentures en every parte afore y<sup>t</sup> tyme made werbroken (*sic*) and noght enrolled and so both parties at yere large, so y<sup>t</sup> y<sup>e</sup> seid Thomas myght their have departyd if hym had list but yit y<sup>e</sup> seid Henry eftsones entretyd y<sup>e</sup> seid Robert to take y<sup>e</sup> seid Thomas apprentice for y<sup>e</sup> terme of xij yere next folowyng y<sup>e</sup> fest of halowen yen last passyd, promittyng to gete suerte for y<sup>e</sup> seid Thomas to be true apprentice duryng y<sup>e</sup> same terme, so y<sup>t</sup> y<sup>e</sup> seid Thomas in y<sup>e</sup> seid terme shuld have covenable lernyng and doctrine as resonably for y<sup>e</sup> profite of sich apprentice shuld belong, the which he had withoute y<sup>t</sup> all y<sup>e</sup> seid Robert at y<sup>t</sup> tyme or eny tyme seth made covaunt with the seid Thomas to fynd hym att scole in sich maner and fourme as y<sup>e</sup> seid Thomas hath surmittyd ; Wherupon y<sup>e</sup> seid Endentures of Apprenteshode were made like as y<sup>e</sup> seid Thomas hath declaryd, the seid Thomas beyng at y<sup>t</sup> tyme in y<sup>e</sup> xiiij yer of his age or nygh upon, by virtue of which Endentures y<sup>e</sup> seid Thomas and by the enrolment yerof was admitte as alafulfull (*sic*) apprentice after y<sup>e</sup> custom of the seid Cite y<sup>e</sup> xxx day of Octobr y<sup>e</sup> yer of the reign of y<sup>e</sup> Kyng aforsaid xxj, the which terme y<sup>e</sup> seid Thomas on his parte hath not truly kept but by hys owne knowlage in hys seid bill nygh y<sup>e</sup> iij parte yerof, y<sup>t</sup> is to witte all most iij yer, wrongfully of hys obstinate willfulnes hath broken and disobeyed, which not withstondyng, y<sup>e</sup> seid Robert seith y<sup>t</sup> y<sup>e</sup> seid Thomas is and afore his departure was sufficiently lernyd and instruct both in redyng and also in wrytyng as unto sich apprentice resonably may suffice, and over all y<sup>is</sup> y<sup>e</sup> seid Robert seith y<sup>t</sup> he

<sup>1</sup> Hole in document.

and y<sup>e</sup> seide Thomas y<sup>e</sup> vij day of Fevr' nowe last passyd at y<sup>e</sup> grete instaunce of y<sup>e</sup> seid Thomas were put in award of iiij notable and thrifty persones, then Wardenz of y<sup>e</sup> Craft of haberdassher of y<sup>e</sup> seid Cite, Arbitrouz bytwix hem both indeferently chosen of all maner causes, accons, querelez, debates and demaundes betwix hem afore y<sup>t</sup> tyme in eny maner of wise had, movyd, or hangyng, The which arbitrouz with in y<sup>e</sup> day to hem yerof limite demyd, awarded and finally determynyd betwix y<sup>e</sup> seid Robert and Thomas, The which award, deme and determinacon y<sup>e</sup> seid Robert is and at at (*sic*) all tymes hath bene redy onhys (*sic*) parte to kepe and performe, notwithstanding y<sup>t</sup> y<sup>e</sup> seid Thomas y<sup>t</sup> at to hym yerof fulfill will in no wise nor obey; The which maters and ich of hem y<sup>e</sup> seid Robert is redy to prove like as this Courte will award, Wherfor he prayth to be dismiss oute of thys Courte and to be restoryd to hys Costes and Damage for hys gret and wrongfull vexacon after the fourme of the Statute, &c.

**Bundle XX, No. 39.**

To þ<sup>e</sup> most reverent Fader in god the Archebisshop of Yorke  
Chaunceler of Ingland.

Besechith mekely Bartholomew Couper, Citezin and Draper of London, that where he now late, that ys to wete the xx day of Decembr the yere of oure sovereigne lorde the kyng that nowe ys the xxix, bargayned with one John Broke of Stoke Neyland in the shire of Suff<sup>r</sup> for to have of him an C clothes called Suff<sup>r</sup> streytes for a certeyn some of money betwene hem accorded; And moreover that thei weren accorded that the seyd clothes shuld be of certein divers colours convenient for such parties beyonde þ<sup>e</sup> see as the seyd Bartholomew at þat tyme notified unto the seid John that he wolde sende hem unto; Wherupon then <sup>xx</sup>ij clothes, parcell of the seid C clothes, at that tyme weren delyvered, And the residue, that ys to say xl clothes, bi the same accorde should have ben delivered unto youre seid besecher at the feste of Estre then next folowyng, at which feste the seyd John of the seid clothes made no deliverance nor yet hidder to have none made ne none woll make, notwithstanding that often tymes he hath ben requyred, to grete hurt and hinderance of youre seyd besecher, for as much as the seid <sup>xx</sup>ij clothes that he hath receyved may not be uttered nor solde to his profite nor availe till he be content and perfourmed of the hole nombre accordyng to þ<sup>e</sup> seid bargeyn: Please youre graciouse lordeshippe considred for as

1452 to  
1454-

much as youre seyde besecher hath no writing to prove the seid covenannt that remedie faileth him at the comone lawe, to graunte a writte sub pena direct unto þ<sup>e</sup> seid John comaundyng him upon a certain peyne to appere before oure lorde þ<sup>e</sup> king in his Chauncerie at a certain day bi you to be lymyted, there to be examened in þ<sup>e</sup> premisses, And therupon such rule and ordinance bi you to be made as gode feyth and conscience requyren.

Plegii de prosequendo :

Johannes Rede.

Ricardus Lawe.

**Bundle XXVII, No. 467.**

To the right reverent fader in god and good and gracious lord  
the Bisshopp of Excestre and Chaunceller of England.

After  
1460.

Besechith mekely youre good lordshipp Andrewe Wolson, Brick-maker, to consider howe oon Herry Johnson, Berebruer, hath attained an Accion of dette of x li. agenst hym in London for a bargayn that was made betwene them in Lambith where they bothe dwell like as all ther neighbours, and reporte that yf the seid Andrewe wolde be served of Bere of the seid Herry youre seid besecher shuld paye noe redy money therfore but Brike and so everich<sup>1</sup> of hem shuld have of other ware for ware ; which bargayn youre said besecher is redie to parfourme and at all tymes hath ben and now the seid Herry wold have redie money of youre seid Suppliaunte, the bargayn notwithstanding, albe hit youre seid besecher myght have ben served of an other Berebruer, like as he was before of hym ware for ware, had nought the said Herry have ben, and so entendith to recover the seid money of youre said besecher agenst all feith and good conscience, to his utter undoyng, withoute youre gracious lordschipp to hym beshewyd (*sic*) in this behalf : Wherefore please it youre good and gracious lordschipp tenderly to consider the premisses and herupon to graunte a Corpus cum causa for youre besecher And he shall contynually pray to god for youre mooste noble estate.

**Bundle XXVIII, No. 210.**

To the Bischop of Excestre Chaunceler of England.

After  
1460.

Mekely besechith your gracious lordschip your pore Oratour William Grene, Marcheant of the Staple of Caley, that where he Delivered C li. sterling at Brugges the second Day of April last

<sup>1</sup> 'everich,' each one (Halliwell).

passid to Thomas Mollesley, factour and attorney veryly knowyn un to John Warde of Loundon Grocer, and to the use of his seid Master to be repaied agen to your said oratour at Loundon the secunde Day of May thanne next folowyng, as more plenely apperith by a bill Directid by the same Thomas un to the said John Ward, his maister; of the hand of the said Thomas Wretyn and signid with his said Masteres Mark, testifying the same after the cours of Marchaundice, at which Day nor no tyme sythen the said John paiyd not your said suppliaunt the said C li. nor noo peany therof, notwithstanding the seid bill testifying the premissis hath ben shewyd unto hym the said sume accordyng to the same Demaund and that he to pay utterly hath refusyd and yit refusyth contrarie to the Cours of trewe Marchaundice to the utter Destruccon and undoyng of your said Besecher : Wherfor please it your gracioux lordschip the premiss tenderly to considere and to graunte a Writte of subpena directe to the said John Warde to appier afore the Kyng in his Chauncerie at a certeyn day there to Answer to the premiss and your said suppliaunt shall pray to god for you.

Plegii de proseguendo :

Rogerus Chesshure, clericus.

Johannes Aleyn de London, Gentilman.

### Bundle XXVIII, No. 299.

To the Reverent Fader in god Bysshoppe of Exceter and  
Chaunceler of Engeland.

Mekely besechith youre poore Oratrice Elizabeth, late the Wyff of John Gambon the yonger, that where, upon the Marriage made and hadde betwene the saide John and Elizabeth, it was appoynted and concluded betwene Jamys Derneford, Fader of the said Elizabeth, and John Gambon the elder, Fader to the saide John Gambon the yonger, that the same John the Fader or his fessées shoulde by thair dede graunte an Annuyte of x li. or ellis make a sure and sufficient astate of londres and tenementes to the yerly value of x li. over all charges and reprises to the said Elizabeth for terme of hir lyfe within iij Mouneththes (*sic*) after the said mariage, And that the said Annuyte or londis should be made as sure to the said Elizabeth as it coude be made by advyse of the Councell of the said Jamys her Fader for terme of hir lyfe ; Natheles after that mariage made and solempnyzed betwene the said John Gambon the yonger and Eliza-

After  
1460.

beth the said John Gambon the yonger died afore any graunte or astate to the said Elizabeth of such Annuyte or londes to be made, how be it that the same Elizabeth ofte tymes sithe the Dethe of the said John Gambon the yonger hathe required the said John Gambon the fader to graunte or make to hir astate of the said Annuyte or londes accordyng to the appoyntements and conclusions abovesaid, And that to do the said John the Fader agenste goode faithe and concience hathe utterly Refused and yeit refusith, to the importable hurte and grete impoverysshment of your said Oratrice which hathe neyther londes nor goodes for hir sustinaunce nor can ne may Recovre or have other then by the mene of concience: Wherfor please it your gracious lordshippe the premisses tenderly to concidre and ther upon to graunte a Writte of Sub pena to be directe to the said John Gambon the elder to appere afore the Kyng in his Chauncery atte a certeyn day by your lordshipp to be limited and under a certeyn payne there to Aunsweare unto the premisses And to abyde there such Rule as your lordshipp and the said Courte ther upon shall concidre and determine, And this for the love of god and in Way of charyte.

Plegii de proseguendo :

Ricardus Pree de London, Gentilman.

Thomas Harryes de Lanevet in Com' Cornub', marchant.

**Bundle XXIX, No. 13.**

To the reverende Fader in god and full gode and gracios lorde the Bisshop of Excerter, Chaunceller of Englonde.

1467 to  
1468.

Humbly beseceth youre gode and gracious lordship your contynuall Oratour, William Elyot of Brystowe, Mercer, graciously to conceyve that where the seid William and oon John Elyot, Fader unto the same William, stondeth bounden bi theire obligacions [in the somme of a C li. to oon Stephen] <sup>1</sup> Stychemerssh for certeyn marchandize of him bought ; wheruppon, and also upon the Frendelynesse bitwene theym, the seid Stephen specially instanced and desired youre seid bisecher, forasmoche as he in the fourme aforesaid was to him so endetted, to deliver [to Stephyn Stychemerssh, sone of the] <sup>1</sup> seid Stephyn, his Fader, all [such] <sup>1</sup> marchandize and money as his seid sonne at eny tyme wolde of him desire to have, promysyng and

<sup>1</sup> Illegible; supplied from the defendant's answer (Bundle XXIX, No. 12), which repeats verbatim the substance of the petition.

grauntyng your bisecher to make him payment therfore ; wherupon the sonne of the seid Stephyn, bi the auctorite and name of [his fadre come to your seid Besecher at]<sup>1</sup> Bristowe and there [desyred of]<sup>1</sup> him certeyne marchandize and money to the sume of <sup>xx</sup>iiij xiiij li., Offeryng him oon obligacion and billes remembryng the same and promised him in the bihalf of the seid Fader that at what tyme after he brought the same [obligacion and billes to his fadre]<sup>1</sup> that then he shuld have deduccion of the same somme of <sup>xx</sup>iiij xiiij li. uppon the obligacion of C li. ; wherupon youre seid bisecher, trustyng specially to the promise and graunte made afore tyme bi his seid Fader, delyvered to the sonne the seid marchandize [and money to the]<sup>1</sup> some of <sup>xx</sup>iiij xiiij li., takyng of the same sonne for his remembrance an obligacion and divers billes provyng the same delyveraunce, to the whiche receyte, aftir that the seid Fader had notice therof, the same Fader bfore worshipfull and full credible persones specially thanked your seid bisecher for the good will that he at his seid instaunce had shewed his seid sonne in that bihalf, and eftsonys accordyng to his seid instance agreed to the same receyt and bfore the seid persones made feithe and promise that your bisecher shulde lose no peny therby ; And howe be it that your seid bisecher oftymes sithen hath [tended] the seid Fader vj li. in money and the obligacion and billes of the seid somme of <sup>xx</sup>iiij xiiij li., desiryng him to take the same vj li. with the obligacion and billes aforeseid in full contentacion and payment of the seid obligacion of C li., The seid Fader, for asmoche as of late [he] hath notice that his seid sonne hath indaungerd himself in the parties of portynggale to his displeasure, Therupon refuseth to be charged with the contentacion and payment of the seid somme of <sup>xx</sup>iiij xiiij bi his seid sonne at his instance and in his name in fourme aforeseid receyved or to make deduction perof upon the seid obligacion of a C li. ; And so demaundeth and entendeth to levye of your bisecher the hole sume of the seid obligacion of a C li., to his uttermost undoyng, without your gracious helpe in this bihalf to hym bi you be shewed : Please it your gode and gracious [lordship, considering]<sup>2</sup> the premisses, to directe a writte Sub Pena unto the seid Fader comaundyng him bi the same upon certeyne payne bi you to be limited to appere afore the kyng, oure soverain lorde, in his Chauncery at a

<sup>1</sup> Illegible ; supplied from the defendant's answer.

<sup>2</sup> Illegible.

certeyn day bi you to be assigned, there to be ruled in the premisses as [reason]<sup>1</sup> and good conscience requiren, and your seid bisecher shall pray to god for you.

Plegii de proseguendo :

Johannes White de Redyng in Com' Berk', Gardener.

Edward . . .<sup>1</sup> de Mussenden in Com' Buk'.

*Endorsed* : Memorandum quod pro eo quod, ista petitione ac responsione ad eandem facta et replicacione in hac parte habita necnon desposicionibus et testimoniis tam ex parte infrascripti Willielmi Elyot quam ex parte infrascripti Stephani Stychemerssh patris in premissis coram domino Rege in Cancellaria sua factis et habitis, lectis et auditis, ac materia in eisdem plenius intellectis (*sic*), visum est Curie Cancellarie predictae quod materia in eadem petitione contenta pro parte dicti Willielmi vera et veraciter probata existit, ac pro eo quod infrascripte sex libre, residue Centum librarum, in dicta petitione specificate in plenam satisfaccionem eorundem Centum librarum in Curia Cancellarie predictae per predictum Willielmum oblata sunt, infrascripto Stephano Stychemerssh, patri, solvende et in eadem Curia in manibus Ricardi Fryston, clerici, restant eidem Stephano libande ; Ideo, vicesimo die Iunii, Anno regni Regis Edwardi quarti sexto, consideratum est per dominum Cancellarie Anglie quod infrascriptum scriptum obligatorium Centum librarum eidem Stephano per predictum Willielmum ac Iohannem Elyot, patrem eiusdem Willielmi, factum, vacuum et nullius valoris penitus existat et quod idem Stephanus idem scriptum obligatorium in Cancellariam predictam deferat ibidem cancellandum et dampnandum aut sufficientes litteras acquietancie pro scripto illo et pecunia in eadem contenta prefatis Willielmo et Iohanni sine dilatione fieri et deliberari et in Cancellaria predicta de recordo irrotulari faciat.

#### Bundle XXIX, No. 12.

This is the Answer of Stephen Stichemersh to the bill put Ageynst hym by William Eliot of Bristowe, merchaunt.

Fyrst, he seith by protestacion that the mater conteyned in þe seid bille is not sufficiant in lawe ne in Consciens, wherby he aught by this Court to be put unto answer ; bot for more pleyn declaracion

<sup>1</sup> Illegible.

of trowth the seid Stephen seith, where it is surmysed by the seid bill that the seid William . . .

(Here follows a copy verbatim of the chief allegations of the petition ; this is omitted.)

. . . herto the seid Stephen seyth that well and trew it is that the seid William and Johr were boundyn to hym in þ<sup>e</sup> seid obligacion in a C li., of which somme thei feithfully promitted hym paiement at the daie conteyned in the same obligacion ; and the seid Stephen seith þat he never instanced ne desyred your seid besechers to deliver to his sone marchaunt dyse and money, grauntyng to mak paiement perof as is surmysed by thair seid bill. And also the seid Stephen seith that is (*sic*) seid sone toke marchaunt dyse of your seid besechers to his owne use and noght to þ<sup>e</sup> use of the seid Stephen in maner and fourme as is conteyned in þ<sup>e</sup> seid bill ; Wheruppon his seid sone become bounde to your seid besechers by his obligacion for the same marchaunt dyse which was bowght of your seid besechers be his seid sone unknowyng to the seid Stephen and withoute assent or Agreement or eny comaundment goven by the seid Stephen to his sone to doo, insomuch as when the seid Bargeyn was in making, thar was certayn merchauntz of Byrstowe (*sic*) at (*sic*) counseled your seid besechers to be wele avysed, for thei underestode veraly þ<sup>t</sup> þ<sup>e</sup> seid Stephen wold never answer of on peny for his seid sone. And also the seid Stephen seith þat your seid besechers never tendyd þ<sup>e</sup> seid vj li. and a obligacion to the seid Stephen as is surmysed bi thair bill ; all which materez þ<sup>e</sup> seid Stephen is redy to prove as this Courte of reason and Consciens wyll rewle hym, and prayeth þat he may be dismissyd with his Costes and his damages for his wrongfull vexacion, accordyng to the statutz in such case ordenyd.

### Bundle XXIX, No. 10.

#### The replication of William Elyot.

William Elyot in his replication reaffirms all the matter set up in his petition and concludes :

‘ . . . All which maters your seid Suppliant is redy to prove as this Courts will A warde ; wherefor he prayeth that the seid Stephen Stychemerssh myght be comytted to warde therefor to A byde un to the tyme he have brought the seid obligacion of C li. into this seid courte to be cancelled and made voide, as good feith and conshens (*sic*) requyreth.’

**Bundle XXIX, No. 11.**

The deposition of John Powele of Bristol and John Glasse ' . . . made in the presence of my lord Chaunceler at the More the xxix day of Novembre by their othes upon a boke', &c.

They swear that, the 13th day of November, 3 Ed. IV, William Elyot came to Stephen Stychemerssh and desired to have the obligation by which he and his father were bound to the said Stephen, and that he (William Elyot) then offered to deliver an obligation and certain bills containing £94, which Stephen, the son, had left with William Elyot for the discharge of £94 against the obligation held by Stephen the elder (i. e. the defendant) ' . . . which Stephen the elder (*sic*) seid to the seid William: I thank you of that ye have do, but what nede ye to doubte of your obligation; ye shall never lose peny therby and all thinges that ye have delivered to my son afore this I have content and paide you, and also ye nede not to be so hasty, for your day is not yet come'.

**Bundle XXIX, No. 9.**

The deposition of William Nyng.

The seid William Nyng, sworn and dywely examyned before my lord Chaunceller in the playn Court of Chauncery, the xxvj day of January, the iiij<sup>th</sup> yere of kyng Edward the iiij<sup>th</sup>, seith and deposith . . .

(This deposition confirms the allegations in the complainant's petition.)

**Bundle XXIX, No. 8.**

The deposition of William Aphowell ' . . . afore the Maister of the rollez '.

(This deposition is in further confirmation of the complainant's allegations.)

**Bundle XXIX, No. 7.**

This is the deposicion of Stephen Stychemerssh of London the yonger, Squyer, made before George, Archebisshopp of Yorke, primat and Chaunceller of Englund, the viij day of July, the v<sup>th</sup> yere of Kyng Edward the iiij<sup>th</sup>.

First, the seid Stephen, sworn upon a boke and duly examyned before the said primat and Chaunceller of Englund, saith and deposith, by the othe pat he hath made, that all such marchaundise

and money that he hath resceyved of oon William Elyot of Bristowe, which amountyth to the some of <sup>xx</sup>iiij and xiiij li. howe he resceyved hit by the comaundement of Stephen Stychemerssh of London, theldyr (*sic*), fader unto the seid Stephen the younger, and in his seid Faderz name as his Factour and never otherwise.

Item: The seid Stephen the yonger by his seid othe seith that his seid Fader also comaunded hym that, as sone as he had receyved the seid marchaundise of the seid William Elyot, that then the seid Stephen the yonger shuld send to his seid Fader for an obligacion by the which the seid William Elyot and oon John Elyot were bounde to the Fader of the seid Stephen, the yonger, in C li. and that he shulde scribe the hole some of the receyt of the seid marchaundise upon the bak of the seid obligacion.

Item: The seid Stephen the yonger by the othe that he hath made saith that he myght not send for the obligacion; Wheruppon he made an obligacon in his owne name to the seid William Elyot, the which obligacon the same William in no wyse wold receyve of the seid Stephen þ<sup>e</sup> yonger as his dede but at the Speciall request of the seid Stephen, the yonger, he receyved hit for a remembrance unto the seid Stephen, the Fader, and noon other maner.

#### Bundle XXIX, No. 6.

The deposition of William Elyot.

(A long deposition by William Elyot in support of his own petition.)

#### Bundle XXIX, No. 5.

The deposition of Robert Talbot.

(A deposition by one Robert Talbot which seems to be in support of the allegations in the defendant's answer.)

#### Bundle XXIX, No. 4.

The declaration of Stephen Stychemerssh the elder.

(A long declaration by the defendant in support of the statements in his answer.)

#### Bundle XXXI, No. 82.

To the most reverent fader in god George Archebissshop of York primat and Chaunceller of Englonde.

Mekely [besecheth your pouer]<sup>1</sup> and contynuell Oratour John of <sup>1470 to</sup> Kent, of London Skynner, that where as oon Gararde Morys of <sup>1471.</sup> London, Barbour, hath [commenced an accion]<sup>1</sup> of trespas agenst

<sup>1</sup> Hole in document.

oon Gyles Thornton, Gentyلمان, for whom your said besecher became suerte, and it was so, gracious lord, [that the said]<sup>1</sup> Gararde promytte unto the said Gyles for to take respyte and sparynge of the callyng uppon the said accion unto the tyme [that the said]<sup>1</sup> Gyles had ben beonde the see and comen ayen with oure Soveraygne Lady the quene, in trust wheroff the said Gyles departed ovre see [in the]<sup>1</sup> ship of Thomas Danyell, Esquyer, the whyche the said Gyles wold nat have doon, had nat the said promyse have been made by the saide Garard unto hym ; And contrary therto now the said Gararde calleth uppon the said accion and so intendyth to condempne the said Gyles for defaute of answeere, agenst all feyth and goode conscience : Wherefore please it your goode and gracious lordship tenderly to consydre the premisses and hereuppon to graunte a certiorari directed to the Shirffes of London for the said Gyles and your said pouer suppliant shall specially pray to gode for yowe.

*Endorsed:* Coram domino Rege in Cancellaria die Mercury, videlicet xxij die Novembris.

**Bundle XXXI, No. 374.**

To the right reverent fader in god and gode and gracious lord the Archbisshop of York and Chaunceller of England.

Probably  
1470 to  
1471.

Mekely besechith youre gode and gracious lordship Thomas Cranwys, Clerk, that wher as oon John Benet and other his cofeffees late beyng seased of a tenement in their demesne as yn fee and the seid John Benet so beyng seased therof enfeffed your seid besecher and oon Thomas Benet, Chapeleyn, to thuse (*sic*) and behofe of your seid besecher and albe it that all the cofeffees of the seid John Benet have relesed unto your seid suppliaunt except on Robert Benet, Clerk, which atte tyme of the seffement so made was at Rome, and in the meane tyme the seid John Benet dyed and anon after his disceas the seid John Benet, Clerk, came fro Rome and your seid besecher came unto hym and requyred hym to relees unto hym as his cofeffours had doon, which to doo he refused, seyng that that (*sic*) the seid John Benet shuld have be indettyd unto hym in the some of v marcs of the which he seid he wold be content or that he releced, and herapon the seid Thomas Benet, cofeffour<sup>2</sup> with your seid besecher, came to hym and seid that yf he wold take to hym xxvj s. . . . d.<sup>3</sup> he wolde brynge to hym a relees to the seid

<sup>1</sup> Hole in document.

<sup>2</sup> Query: a mistake for 'cofeoffee'?

<sup>3</sup> Illegible.

John Benet Clerk and your besecher, puttyng full Truste in the seid Thomas Benet, yn asmoche as he was his Cofeffour<sup>1</sup>, toke to hym the seid xxvj s. v . . . d.<sup>2</sup> for the getyng of the seid relees and it is so, gracious lord, that your seid besecher hath often tymes requyred the seid Thomas Benet to delyver hym the seid relees of the seid John Benet Clerk and also to relees unto hym the right that he hath forth-with your seid besecher in the seid tenement and gardyn, which so to do he utterly hath refusid and yet doth agenst all right and conscience : wherfor please it your gode and gracious lordship, the premisses tenderly to consider and that your seid besecher can have no remedy at the comyn lawe, to graunte a writte sub pena to be direct to the seid Thomas Benet strengtly comaundyng hym by the same to appere afore the kyng in his Chauncery at a certayn day and under a certayn payne by your lordship to be lymyt ther to be examined of the premyssez and to do and receyve as right and conscience shall requyre, for the love of god and yn the wey of charyte.

Plegii de proseguendo :

Simon Reynold de London, Gentilman.

Johannes Payn de eadem, Gentilman.

**Bundle XXXIX, No. 55.**

To the full reverent Fader in god the bisshop of Bathe Chaunceller of Englund.

Besechet lowely your pore oratour John Langton, Chaunceller of the universite of Cantebrigge, that where the seyd Chaunceller and universite by the assent and graunt of our sovereign lord the Kyng have late ordeyned to founde and stablisse a college in the same toun it to be called the universite college and to endowe it with diverses possessions in relevyng of the sayd universite and encresing of clergie therof, And how late acorde took bytwix oon Sir William Byngham that the seyd Chaunceller and scolers shuld have a place of the seyd Sir William adioynyng on every side to the ground of the seyd Chaunceller and universite that they have ordeyned to bild her seyd college upon for the augmencacon and enlargeyng of her seyd college and to edifie upon certein scoles of Civill and other faculteez, and for to gif the sayd Sir William a noder place therfor lyeng in the sayd toun bitwix the whit Freres and seint Johns Chirch and do it to be amorteyssed suerly after the intent of the seyd Sir William of the cost of the seyd Chaunceller and universite, os the ful reverent fader

After  
1433-

<sup>1</sup> See n. 2, p. 220.

<sup>2</sup> Illegible.

in god, the bisshop of Lincoln, in whos presence this covenaut and acorde was made, wole recorde ; And it is so, reverent lord, that the seyd Chaunceller and universite acordyng to this covenaut have ordeyned the sayd Sir William a sufficeaunt place lyeing in the seyd toun of Canterbrige bytwix the said Whit Freres and seint Johns Chirch and extendyng down to the Ryver of the same toun wyth a gardeyn therto, which place is of better value then this other place is, and profred to amorteyse it at her own cost acordyng to the covenaut forseyd, and therupon diverse costes and grete labores have made and doon late therfor ; And also required divers tymes the seyd Sir William to lepe<sup>1</sup> and performe on his party these seyd covenautz, the seyd Sir William now of self wille and wythoute any cause refusith it and will not doo it in noo wise: Plesse it to your gracious lordship to consider thes premisses and therupon to graunt to your seyd besechers a writ sub pena direct to the seyd Sir William to appere afore yow in the Chauncery of our lord kyng at a certain day upon a certain payne be yow to be limited, to be examened of these materes forseid and therupon to ordeyne by your gracious lordship that the said Sir William may be compelled to do that trowth, good feith and consciens requiren in this caas, considering that in alsomich as there is no writing bitwix your seyd besechers and the seyd Sir William thei may have noon accon at the comyn lawe, and that for god and in wey of charite.

**Bundle XLIV, No. 142.**

To the Right Reverent Fader in god the Bisshop of Bathe  
Chaunceller of England.

1470 to      Mekely besechen youre humble suppliauntes, Mathew Phylipp,  
1471.      Citezin and Alderman of London, and Thomas Coke, knyght, that  
where Johanne Reynolde, William Reynolde and Thomas Baldewyn,  
executours of the testament of Richard Reynolde, afore this tyme  
bargayned and solde unto oon Richard Wright certayne wollen  
Clothes, Corses,<sup>2</sup> lases and Rybons and divers dettis belonging unto  
the said Johanne, William Reynolde and Thomas Baldewyn as  
executours of the testament aforesaid, for the some of xij<sup>xx</sup>l., paiaible  
at certayne daies bitwex thaim accorded ; for the which some youre

<sup>1</sup> Query : a mistake for 'kepe' ?

<sup>2</sup> 'Corse,' a silk riband, woven or braided (Halliwell).

said besechers oonly at the speciall instance and praier of Piers Ardeyn, knyght, late Chief Baron of the Kynges Eschequer, be came suertes unto the said Executours and were bounde ioyntly and severally to thaim in the said some by divers obligacions for the said Richard Wright, which Richard thanne hadde wedded the Nece of the said Piers Ardeyn. Which Piers promised faithfully and wolde that thei therof shulde bee saved harmles, and after the said Piers made his executrix Kateryn, thanne his wiff and now the wiff of Sir John Cheyne, Knyght, which hath taken uppon here the administraction of the goodes of the said Piers as his Executrix ; and moreover it is soo that sith the decesse of the said Piers, the said William Reynolde, oon of the Executours of the said Richard Reynolde which survived his coexecutours, hath taken an accon of dett in London of Clxx li., parcelle of the said some of <sup>xx</sup>xij li., which accon was nowe of late removed afore the Kyng in his Chauncery by a Certiory, and afterward, for certayne consideracons movyng youre good lordship, Remitted agen, soo that youre said suppliauntes stande yet bounde in the said somme of Clxx li., parcell of the said <sup>xx</sup>xij li., and in greet iupardie therof, and have no suerte for thair indempnite in that behalve nor remedy by the comon lawe but stande destitute of remedye w<sup>t</sup>out your gracious lordship to thaim be shewed in this partie : Please it the same youre good and gracious lordship the premisses tenderly to consider and theruppon to graunte a writte sub pena to bee directed to the said John Chayne, Knyght, and Kateryn, his wiff, which have goodes sufficient in thair handes that were the said Piers Ardeyn's, lawfully to content the said Clxx li. if it bee due, comaundyng thaim by the same to appere afore the Kyng in his Chauncery at a certayn day and under a certayne payne by youre good lordship to be limited, there to answer to the premisses and theruppon that it may please your good lordship to sette such direcon and rule therin for the indempnite of your said suppliauntes as shalbe (*sic*) thought to your good lordship to be accordyng to faith, reason and good conscience, and this at the reverence of god and in wey of Charite.

Plegii de proseguendo :

Ricardus Whyte de London, Gentilman.

Ricardus Lowe de London, Gentilman.

*Endorsed :*

Coram domino Rege in Cancellaria sua in quindena Sancti Martini  
proxima futura.

Memorandum, that the xj day of Febr', xlix yere of the reigne of Kyng Henry the vj<sup>th</sup>, &c., This bill withynwritten atte the suyte of Thomas Cook, Knyght, and Mathewe Philipp agenst the withyn-written John Cheyne, Knyght, and Kateryn, his wyfe, executrix of the testament of Piers Ardeyn, Knyght, the aunswer, replication,<sup>1</sup> and reioynyn<sup>1</sup> to the same, alle proves also and examinacions and othir circumstancez dependyng uppon the same of both partiez pleynly herd and understoud, with gode and ripe deliberacion theruppon had, it is considerid and iuged by the reverend fader in god, George, Archebisshop of York,<sup>2</sup> Chaunceler of England, and by consideracion of the Courte, that the seid John Cheyne and Kateryne shal acquyte and discharge the seid Thomas and Mathewe agenst the withyn-written William Reynold of and for the withynspecified obligacions and every some therof, accordyng to the seid petition of the seid Thomas and Mathewe, &c.

**Bundle XLIV, No. 143.**

This is the answer of John Cheyne, Knyght, and Kateryne, his wiff, to a bill of Subpena brought agaynst them by Mathew Phillypp and Thomas Cooke, Knyght.

By protestacion that the mater conteyned in the bill is nat sufficiaunt in lawe netheir in conscience to putt them to answer ; Nevertheles, for trouth of the mater, the seid John and Kateryne saith that wher In the forseid bill is conteyned . . .

(Here follows a brief summary of the complainant's bill.)

Theirto the seid John and Katherine seith that the seid Mathew Phillypp and Thomas Cooke wher never bounden unto the seid Johane Raynold, William Raynold and Thomas Baldwyn at the instaunce and prae of the seid Sir Piers Ardeyn in maner and fourme as they have supposed by their bill ; and forthermore they say that the seid Sir Piers Ardeyn never made suche promyse unto the seid Mathewe Phillypp and Thomas Cooke to save them harmles in maner and fourme as they have surmytted ; and more over the seid Sir John Cheyne and Katherine, his wiff, say that sith the deth of the

<sup>1</sup> Only the answer is preserved.

<sup>2</sup> Chancellor Oct.-April, 1470-1 (restoration of Henry VI).

seid Sir Piers Ardeyn and byfore this bill of Subpena sued they have paid for the dettes of the seid Sir Pyers Ardeyn dyvers grette and notable somez of money and have parfourned and don otheir dedez of charite accordyng to the will of the seid Sir Piers Ardeyn and emoung otheir in Bylddyng of his Chaunterye and the Chyrche Stapill in the Town of Latton, in the Counte of Essex, to the grete charge and costes of the seid Sir John Cheyne and Katerine, his wiff, ov which charges and costes the seid Sir John Cheyne and Katerine, his Wiff, have nat nor hade nat in their handes at the tyme of this bill brought nor no tyme sith netheir goodes ne catalles of the seid Sir Piers Ardeyn to the value of the seid somez conteyned in the seid obligations; all which maters they ar redy to prove as this Court will award Jugement and praith that they may be dismysed.

**Bundle LIX, No. 114.**

To the right reverent Fader in god the Bissshop of Lincoln  
Chaunceller of England.

Mekely besecheth youre good and gracious lordship John Whithed, Esquier, that wher as oon Robert Orchard late in an accoon of waste suyd by the seid John Whithed ageyn the seid Robert before the kinges Justices of his comone benche for brennyng<sup>1</sup> of a water Mill, whiche the seid John Whithed had before leten to ferme to the seid Robert for terme of certeyn yeres, was condempnayd to the seid John Whithed in xxx li., and the seid Robert Orchard also at the suyte of the seid John Whithed by processe thereuppon had was for the same xxx li. in prison and execucon unto the tyme that John Spryng of Suthampton, Peautrer, grauntyd and feithefully promysyd to the seid John Whithed that, yf he wold relese and discharge the seid Robert Orchard of his seid imprisonment and execucon and suffere hym to go at his liberte, that then the seid John Spryng at his owne propre cost and charge wold sufficiently and substancially edifie and bilde the seid mill ageyne bothe in tymber werk and stonys to the same expedient by a certeyn day now long tyme past; Wheruppon the seid John Whithed, trystyng the promysse of the seid John Spryng, at his desyre immediatly releasyd and discharged the seid Robert Orchard of his seid execucon and lete hym go at large at his liberte, and howe be hit that the seid John Spryng before the seid day reedified not the seid Mill in fourme aforseid nor no

After  
1475.

<sup>1</sup> 'Brenne,' to burn (Halliwell).

part thereof and that the seid John Whithed often tymes sythe the seid day hathe requyred the seid John Spryng to reedifie and bilde the seid Mill as ys aforeseid acordyng to his seid promyse, that to do at all tymes as yet he hath refusyd, contrarie to his seid promysse, good feithe and conciens, of whiche your seid besecher hathe no remedie by the comone law of this land : Wherefor pleaseth hit youre good and gracious lordship, the premissis tenderly considered, to graunt a writ Suppenna to be directed to the seid John Spryng comandyng hym by the same to appere before the kyng in his Chauncery at a certayne day and undur a certeyne payne by youre lordship to be lymitted and ther to be rewled and Jugged as good conciens requyreth, for the love of god and in wey of cheryte.

[Plegii de prosequendo:]

Johannes Purvyer de London, Iremonger.

Thomas Clyfton de eadem, Draper.

*Endorsed:* Coram domino Rege in Cancellaria sua in quindena sancti Iohannis Baptiste.

**Bundle LIX, No. 117.**

To the right reverent Fadere in god the Bisshop of Lincoln  
Chaunceller of England.

After  
1475.

Mekely besecheth youre good lordship Richard Colnet that where as oon John Hill of the Cite of Wynchestre in a pleynt of Detenue of a Cloth of the value of x mark by the seid Richard Colnet late ageyn the same John Hill before the Mayre and Baylyes of the same Cite affermed, was condempnyd to the seid Richard Colnet in vij li., and thereuppon in prison in kepyng of the seid Baylyes and execucon for the same and so restyd in execucon till the seid John Hill desyred the seid Richard Colnet to relese and discharge hym of his seid execucon and to geve hym dayes of payment of the seid vij li., promyttyng feithefully to the seid Richard Colnet that Immediatly after that he were at large and so discharged of his seid execucon that he wold do make an obligacon of the seid vij li. to be payd to the seid Richard at certayn dayes betwene them then acordyd ; whereuppon the seid Richard, trystyng to the promyse of the seid John, releasyd his seid execucon and caused the same John Hill to be at his liberte, Sithe whiche Relesse and discharge the seid Richard hathe often tymes requyred the seid John Hill to do make to hym the seid obligacon of vij li. acordyng to his seid promyse and that to do the

seid John Hille at all tymes hathe refusyd and yet refuseth, contrarie to his seid promyse and good conciens, of whiche youre seid besecher hathe no Remedye by the comone lawe of this land : wherfor pleaseth hit youre good and gracious lordship, the premisses tenderly considered, to graunt a writ Subpena to be directed to the seid John Hill comaundyng hym by the same to appere before the Kyng in his Chauncery at a certeyn day and under a certeyn payne by youre lordship to be lymytted and there to be rewled and Jugged as consciens requyreth, for the love of god and in wey of cheryte.

Plegii de prosequendo :

Willielmus Lyngard de London, Grocer.

Ricardus Farlyng de London, Yoman.

*Endorsed:* Coram Rege in Cancellare (*sic*) sua in xv<sup>th</sup> sancti Iohannis Baptiste.

**Bundle LIX, No. 132.**

To the Right reverent Lorde and Fader in god the Bisshop of  
Lincoln and Chaunceller of England.<sup>1</sup>

Mekely besechith youre goode and gracious lordship Richard Massy of London Goldsmyth that where Edmund Chertsey late of Rouchester in the Countie of Kent, Gentilman, promysed to youre saide besecher if he wold marye Maryon, doughter of the saide Edmund, 1 marcs of lawfull money, in trust of which promysse youre saide besecher toke the saide Maryon to wif, at which tyme of mariage the saide Edmund paied to youre saide besecher xx li. parcell of the saide 1 marcs and as for xx marcs residue of the said some youre said besecher is not as yit contented [nor]<sup>2</sup> paied and afterward the saide Edmund made John Bamme his executour and dissesed, the which John Bamme hath godes the which were the saide Edmund at the tyme of his deth sufficient to content the saide xx marcs and more and the saide John Bamme hath often tymes ben required by youre saide besecher to content and paye hym the same xx marcs and he that to doo hath at all tymes refused contrary to goode consciens, wherof youre saide besecher hath no remedy by the Cours of the Comon lawe. Please it therfore your goode lordship the premisses tenderly considered to graunte a Writte Subpena tobe (*sic*) directed

After  
1475.

<sup>1</sup> See Bundle LIX, Nos. 137-9, for amended bill, answer, and replication.

<sup>2</sup> Hole in document.

to the saide John Bamme comaundyng hym by the same to appere be fore the kyng in his Chauncerie at certeyn day and uppon certeyn payne by youre goode lordship to be lymitted to answere the premisses and to doo as goode consciens requireth and your saide besecher shall praye to god for your goode lordship.

Plegii de prosequendo :

Jacobus Galon de London, Gent'.

Edwardus Bowdon de eadem, Yoman.

*Endorsed*: Coram domino in Cancellaria sua in quindena Pasche proxima futura.

**Bundle LIX, No. 133.**

The Answer of John Bamme to the byll of Ric' Massy.

The seid John Bamme, by protestacon that the mater conteyned in the bill of the seid Richard Massy is nat sufficient in lawe nor Conscience wherto the same John owe to answer, seith that Edmund Chertesey namyd in the bill of the seid Richard made his executours Alianor Chertesey, late the wife of the seid Edmund, Wyllyam Chertesey, Squyer, sone and heir to the same Edmund, and the forseid John Bamme, which Alianor and Wyllyam as well admynystred the godes of the seid Edmund as the forseid John Bamme, and for asmoche as the same Alianor and Wyllyam be yit in playn life and nat namyd in the bill of the seid Richard, the same John Bamme praieth that the byll of the forseid Richard therfor be abated and that the seid John Bamme be dysmyssed owte of this Courte.

**Bundle LIX, No. 137.**

To the right reverend fader in god and right gode and gracious lord my Lord of Lincoln Chaunceller of Englund.

After  
1475.

Mekely besecheth your gode and gracious Lordship, your humble Oratour, Richard Massy of London, Goldsmyth, That where Edmond Chertesey, late of Rouchestre in the Countie of Kent, Gentilman, promysed unto youre seid besecher if he wold marye and wedde Maryone, daughter of the seid Edmond, 1 marc of lawfull money of Englund. In trust of whiche promisse, youre seid besecher toke the seid Marione to wife ; at the tyme of which mariage the seid Edmond payed to the your seid besecher xx li. parcell of the seid 1 marcs, and as for xx marc, residue of p<sup>e</sup> seid 1 marc, your seid besecher is not

yet payed nor contented; and afterward the seid Edmond made Alianore, his wif, Willyam Chertesey and John Bamme his executoures and dyed. The which executoures have goodes which were þ<sup>e</sup> godes of þ<sup>e</sup> [seid]<sup>1</sup> Edmond the tyme of his deth sufficient to contente your seid Oratoure of þ<sup>e</sup> seid xx marc and more. And how be it that your seid besecher hath often tymes required the seid executoures to pay unto hym the seid xx marcs, yet that to do they at all tymes have refused and yet doth, ageyn all right and conscience, wherof your seid Orator hath no remedy by the comyn lawe of the land: Please it þerefore your gode lordship, the premisses considered, to graunte severall writtes of sub pena to be directe to the seid executoures Comaundyng them to appiere afore the kyng in his Chauncerye at a certayn day and under a certayn payn there to answer unto the premisses, and furthermore to do therin as by the seid Courte shal be demed and awarded, and that for the love of god and in wey of charite.

Plegii de prosequendo:

Jacobus Galon de London, Gent'.

Edwardus Bowdon de eadem, yoman.

*Endorsed*: Coram domino Rege in Cancellaria sua in quindena Pasche proxima futura, breve directa Iohanni Bamme. Et memorandum quod xvij die Aprilis emanarunt duo alia brevia directa infrascripto Willielmo Chertesey et Alianore Chertesey respondendum Crastino Sancti Iohannis Baptiste futuro.

Memorandum quod xij die Octobris anno presenti dies data est partibus infrascriptis ad producendum testes ad probandum materiam infrascriptum (*sic*) hincunde usque Crastino Sancti Martini proximo futuro ex assensu utriusque partis.

### Bundle LIX, No. 138.

#### The defendants' answer.

Defendants in their answer say by protestation that the matter contained in the bill is not sufficient to put them to answer. They then set up other facts, denying that Edmund Chertesey ever promised more than £20, which, they say, is paid; they also allege against the complainant a promise of his own which, they say, remains unperformed. Also they say that they have administered fully, &c.

<sup>1</sup> Hole in document.

**Bundle LIX, No. 139.**

The complainant's replication.

Complainant in his replication reaffirms the facts set up in his petition, and denies those alleged by the defendants in their answer, and concludes with the prayer that . . . 'the same executours may be rueled to pay to hym the same xx marcs accordyng to conscience'.

**Bundle LIX, No. 185.**

To the right reverent Fader in god the Bisshop of Lincoln  
and Chauncellar of England.

After  
1475.

Mekely besechith your gracious lordship Adam Knyght of Shrowesbury where on John Adams of Acton Burnell sold to your said suppliant certeyn wolles beyng in an house at Acton Burnell in grete at aventure for vij marcs to be paied at such tyme as your said suppliant shuld fette the said wolles, before which tyme your Oratour paied to the said John Adams for the [saide]<sup>1</sup> wolles v marcs, parcell of the said vij marcs; And afterward he send his servant dyverse tymes for the said wolles to have lyvere therof accordyng to his bargayn and therof he was denyed, for the said wolles were not the said John Adams at the tyme of the said bargayn; by which bargayn soo untruely made the proprete of the said wolles vested not in youre said suppliant, and so [he] is withoute accion by the Cours of the comen lawe to his grete hurte in lesse your gracious lordship be shewed to hym in this behalfe: Please it therfore the same your lordship, the premisses considered, to graunte a writte of sub pena to be directe to the said John Adams comaundyng hym by the same to appere before the kyng in his Chauncerye at a certen day and upon a certen payn by your lordship to be lymet to answeere to the premysses and thanne and there such direccion to be had heryn by your said lordship as shalbe thought to the same accordyng to reason and conscience, and this for the love of god and in wey of charite.

Plegii de prosequendo:

Johannes Baker de London.

Willielmus Hauke de eadem, yoman.

<sup>1</sup> Hole in document.

## Bundle LIX, No. 227.

To the right reverend Fader in god and my gode lorde the  
Bisshope of Lyncoln Chauncellar of Englonde.

Mekely besecheth your gode and gracious lordshipp your Poure 1480 to  
Oratour Roger Godemond, that where he afore this tyme upon a x 1481.  
yere past and more was bounde to one Alice Reme, Wedowe, be his  
syngle Obligacion in x marke sterlyng paiable at a certeyn day in the  
seid Obligacion specified, and afterward the same Alice made her  
executours John Hale and one Thomas Plane and died, after whos  
dethe your seid Oratour truly paied and full contented the seid  
executours of the dewete of the seid obligacion, trustyng be that pay-  
ment to have be discharged of the seid Obligacion lefte the same  
Obligacion in the handys of the seid executours and trustyng that  
the seid executours wolde have delyvered the seid Obligacion to  
your seid besecher at all tymes when they hadde ben therto requyred ;  
and afterward the seid John Hale died after whos dethe the seid  
Thomas Plane as executour of the seid Alice, not withstandyng the  
seid payment hadde and contentacion of the Obligacion made,  
suethe an accion of dette nowe late afore the kyngis Justice of the  
Comen place upon the seid Obligacion agenst your seid besecher,  
not dredyng god ne th'offens of his owne consciens, intendyng be the  
same accion shortly to condempne your seid besecher in the seid  
x marke, be cause the seid payment can make no barr at the comen  
lawe and so to be twys satisfied upon the same Obligacion for one  
dewte, contrary to all reason and gode conscience, wherof your seid  
besecher is withoute remedy be the Comen lawe withoute your gode  
and gracious lordshipp to hym be shewed in this behalve : Please it  
therfor your gode and gracious lordshipp the premysses tenderly to  
consyder and to graunte a writte Suppena to be directe to the seid  
Thomas Plane comaundyng hym be the same to appere afore the  
kyng in his Court of Chauncerie at a certeyn day and upon a certeyn  
peyn be your lordshipp to be lemette, there to answer to the pre-  
mysses and to bryng afore your seid lordshipp the seid Obligacion to  
be cancelled, and fethermore that he may have ynyongcion no  
further to procede in the seid accion at Comen lawe till your seid  
lordshipp have examyned the premysses and sett such rewle and

direction in the same as shall accorde with reason and gode consciens, and this for the love of god and in the Wey of Charite.

Plegii de proseguendo :

Ricardus Somer de London, Gentilman.

Thomas Mey de London, Gent'.

*Endorsed*: Coram domino Rege in Cancellaria in Crastino Animarum futuro.

Memorandum quod termino Sancti Michaelis, videlicet sexto die Novembris Anno etc. xix<sup>o</sup>, iniunctum fuit Thome Sharp, attorn' infranominati Thome Plane, quod ipse sub pena Centum marcarum minime prosequatur versus infranominatum Rogerum Godemond in quodam placito debiti super demandum decem marcarum coram Iusticiis Regis de Banco suo, quousque materia infraspecificata plene determinata fuerit et discussa.

**Bundle LIX, No. 228.**

This is the answer of Thomas Plane on of the executours of Alice Reme, Wedowe, to the bill of complaynt of Roger Godmond.

The seid Thomas Plane by protestacon sayeth that the mater conteigned in the bill of compleynt of the seid Roger is not sufficient in lawe to put hym to answer to the same ; for plee he sayeth that the seid Roger paid not the seid x marcs nor non parcell there of to the seid Thomas plane ne to John Hale his coexecutour in maner and forme as the seid Roger be his seid bille of complaynt hath surmytted ; all whiche maters the seid Thomas plane is redy to averre as this court will award, and askith iuggement and prayeth to be dysmyssed out of this court wyth his resonable costys and expenses for his wrongfull hurte and vexacon in that behalf don, had or susteyned.

**Bundle LIX, No. 285.<sup>1</sup>**

Addressed to the Bishop of Lincoln.

1479 to  
1480.

The complainant is one Cecil Merfyn, executrix of the testament of John Merfyn. The substance of her petition is as follows :

John Merfyn and William Clyfford bound themselves jointly and severally in an obligation of £140 . . . to the use of Agnes, wife of William Halowe, late the wife of Henry Cheveley . . . to the intent that an estate of lands and tenements of the annual value

<sup>1</sup> The substance of the petition is given ; the endorsement is transcribed in full.

of 12 marks should be made to the said Agnes within two years following. After the decease of John Merfyn and William Clyfford, complainant caused a sufficient estate to be made to Agnes within the time limited . . . 'accordyng to the trewe intent of the makyng of the seid obligacon,' . . . yet Geoffrey and William Hamond (the defendants) will not give up the obligation, nor make acquittance thereof, but are now suing an action against the complainant in the king's court, 'callid the Comone place,' upon the said obligation, which is against all reason and conscience. Complainant says she has no remedy at law. She prays for a subpoena to be directed to the defendants, Geoffrey Blodwell and William Hamond, and asks general relief.

The petition is endorsed as follows :

Coram domino Rege in Cancellaria sua in xv Sancti Iohannis proximo futuro.

Memorandum quod termino sancte Trinitatis, videlicet nono die July anno regni Regis Edwardi quarti decimo octavo, Ista petitione per infrascriptam Ceciliam Merfyn coram dicto domino Rege in Cancellaria sua versus infrascriptum Galfridum Blodwell et Willielmum Hamond exhibita, ac responsione<sup>1</sup> prefati Galfridi eidem petitioni facta, lectis, visis et auditis et ad plenum intellectis, advocatis que (*sic*) tam infrascripto Willielmo Halowe et Agnete uxore sua quam prefata Cecilia Merfyn et super materia (*sic*) huius petitionis diligenter examinatis, iidemque Galfridus, Willielmus, Agnes et Cecilia fatebantur et recognoverunt infranotatam obligacionem factam et delibatam fuisse prefatis Galfrido et Willielmo ad intencionem infrspecificatam, ipsi Willielmus Halowe et Agnes tunc ibidem presentes recognoverunt de fore satisfacta et contenta iuxta allegacionem petitionis predicte et secundum causam ob quam ipsa obligacio facta fuerat, unde dicta Cecilia peciit quod dicti Galfridus et Willielmus Agnes, uxor eius, per auctoritatem huius Curie ad dictam obligacionem sibi delibandam et cancellandam compellantur, quamobrem dicta obligacio per prefatos Willielmum et Agnecem prefato (*sic*) Cecilie per auctoritatem Curie Cancellarie predicte et per consensum parcium delibata fuit cancellandum.

#### Bundle LXXI, No. 7.

Right mekely besechith youre continuell oratoure, Richard Dryfeld of London, Clerke, that, ther as William Brampton, Citeceyn and Scryvener of the said Citee, made contracte of Mariage by

Date uncertain.

<sup>1</sup> No answer is preserved.

his owne pursuyng by twene the seid Richard and Denys, the Doughter of Thomas Sele, the said William Brampton promysyd to the said Richard x marcs of sterlinges and other x marcs in howsold to be paied by the handes of the said William Brampton, of the whiche the said Richard hath reseyved vj marcs in mony and in howshold the value of viij marcs, whiche the said Richard hath divers tymys asked in presence of worthy men ; but for as muche as the same Richard hath noght to shewe for hym in wrytyng the said William Brampton wolnot (*sic*) do hym ryght, sayng that he can never recover any thyng of hym be the comyn lawe, and thus with owt youre gracious lordschip youre said besecher ys with owte remedy : where fore plese hit your god and gracious lordschip to make the said William to appere afore yowe in the Kynges Chauncellarie and to shewe whi youre said besecher shuld not be content after promys made be twix them, and also to abyde and resayve that schall [be] ordeynyd at that tyme by youre full and gracious lordship, and this for the love of god and in Way of Charite.

**Bundle LXXI, No. 8.<sup>1</sup>**

**The answer of William Brampton.**

William Brampton says in substance :

That the said Richard by mediation of friends 'laboured to þe seid Thomas, fader of þe seid Denys, . . . of his owen desire willing to have . . . ' the said Denys as his wife. And as William Brampton is a cousin of Denys, complainant asked him to come and 'to here the comunicacon bitwene þe seid Richard and Denys, upon which comunicacon the seid Richard desired xx marcs w<sup>t</sup> the seid Denys ; To which matier it was answerd by þe seid William in name of þe seid Thomas and his frendes, þat, yf þe seid Richard wold have þe seid Denys to wyf, that he and all the frendes of þe seid Denys wold make hir worth x marcs in money and in godes ; To which the seid Richard agreed and þerupon wedded þe seid Denys and of þe seid x mark in money and godes the seid William and frendes of the seid Denys hath content þe seid Richard and more ' . . . , &c.

<sup>1</sup> As this document is very long the substance of it only is given.

# INDEX

Abroad, Agreement made, 76, 102.  
 Accord and Satisfaction, in Deed, 23.  
 Account, Action of, 13 ff.  
 —, relation to Debt, 15.  
 —, suspended by death, 15.  
 —, specific performance in, 16.  
 Agency, 130-2.  
 —, in Debt, 38, 55.  
 Aliens, as parties to suits, 76.  
 Ames, Professor J. B., 29, 31 f., 49, 61 f., 160.  
 Arbitrators, 141.  
 Ascough, J., 52.  
 Assignment, of chose in action, 56, 107 ff.  
 —, of rights, 120.  
 Assumpsit, 40-54, 106, 109, 117, 138, 162.  
 —, consideration in, 59 ff.  
 —, and Debt, 35, 53.  
 —, delictual basis of, 40 ff., 59.  
 —, and Detinue, 28, 53.  
 —, lies for misfeasance, 44 ff.  
 —, lies for nonfeasance, 46 ff.  
 Attachment, 83.  
 'Award', 141.  
 Babington, C. J., 48.  
 Bacon, Lord, quoted, 25.  
 Baildon, Mr., 67, 70.  
 Bailiffs, 14.  
 Bailment, and Detinue, 29 ff., 33, 57, 113.  
 Beneficiary, Action by, 126, 164.  
 Bereford, C. J., 23, 36.  
 Bishops, as chancellors, 144.  
 Blackstone, 43, 162.  
 Bonds, 90, 93, 98.  
 Bracton, 18.  
 Brian, J., 30, 35, 153.  
 Bribery, in common law suits, 79.  
 Bristol, Covenant in. *See* Covenant.  
 Building, Agreements for, 138 f.  
 Canon law, in chancery, 158, 167.  
 Carriage of goods, 139 ff.  
 Carriers, Common, 45.  
 Cases :  
*Anon v. Anon*, Y. B. 6 and 7 Ed. II, 36, 23 n., 27 n.  
*Applethwaite v. Northby*, 124 n.

*Bokeland v. Leanore*, 22, 133 n.  
*Briddicote v. Forster*, 69 n.  
*Bryant v. Herbert*, 169.  
*Carteret, Lord, v. Paschal*, 109 n.  
*Chawmer v. Bowes*, 20 n.  
*Clemens v. Flight*, 170.  
*Coré's Case*, 15 n.  
*Crow v. Rogers*, 126 n.  
*Esthale v. Esthale*, 24.  
*Greed v. Cope*, 78 n.  
*Hals v. Hyneley*, 146 n.  
*Lampel's Case*, 108 n.  
*Pinchon's Case*, 103 n.  
*Raudolf v. L'Abbé de Hughes*, 27 n.  
*Scrimshire v. Alderton*, 132 n.  
*Sutton v. Grey*, 132 n.  
*Wade and Bembo's Case*, 19 n.  
*Walewayn v. Rem*, 27 n.  
*Wheler v. Huchynsen*, 122 n., 163.  
 'Cause', in canon law, doctrine of, 165, 167.  
*Certiorari*, 89, 116, 134, 145.  
 Chancellor, Activity in fifteenth century, 66 ff.  
 —, Bishops as. *See* Bishops.  
 —, Ecclesiastical principles of, 163.  
 —, Oral examination by, 70, 91.  
 —, Principles followed by, 82 ff., 96, 114, 152 ff.  
 Chancery, Activity in fifteenth century, 66 ff.  
 —, Advantages over common law, 70 f.  
 —, Canon law in, 158, 167.  
 —, Charitable functions of, 78 ff.  
 —, Clerk in. *See* Clerk.  
 —, not a court of record, 146.  
 —, Place of jurisdiction, 76.  
 —, Proof in, 147.  
 —, supplements common law, 151 f.  
 Chattels, Sale of, 55, 114 ff.  
 —, Restitution of, in chancery, 57, 111 ff.  
 Chester, County of, 82.  
 Chose in action. *See* Assignment.  
 Clerk in chancery, 76, 98.  
 Cokayne, J., 48.  
 Coke, 43.  
 Commercial transactions, 153.  
*Commodatum*, 27.  
 Common law, Feudal origins of, 11, 153.  
 —, Inconveniences of, 75 ff., 150 ff.

Common law, Advantages of chancery over. *See* Chancery.

Common Pleas, 68, 75.

Compromise of claims, Agreements for, 141 ff.

Conditions in contracts, 90 ff.

'Confidence, Breach of', 152.

Consideration, Doctrine of, History and theories of, 59-65, 166.

—, in assignment, 109.

—, in a deed, 23.

—, failure of, 96.

—, in sales of land, 119.

Conveyances of land. *See* Land.

Corody, 11.

*Corpus cum causa*, 86, 105, 145.

Cotesmore, J., 51.

Covenant, Action of, 17 ff., 123.

—, analogies in equity, 73.

—, in agreements for land, 17, 117.

—, in London and Bristol, 19.

—, relation to Debt, 19 f.

—, requires deed, 18 f.

Damages, in chancery, 123.

Debt, Action of, 34-6.

—, Relation to Account, 15.

—, " Assumpsit, 53.

—, " Covenant, 19.

—, " Deed, 24.

—, " Detinue, 25-40, 115.

—, analogies in equity, 73 f.

—, treatment in equity, 97 ff., 106.

—, Wager of law in, 99.

—, in marriage settlements, 124.

—, in partnership, 130.

Deceit, 51, 161 f.

*Deiimus potestatem*, 149.

Deed, in Covenant, 18-20.

—, in Debt, 38.

Detinue, Action of, 28 ff., 169 f.

—, and Assumpsit, 53.

—, and Debt, 25-40, 115.

—, origin and basis, 28-33.

—, in chancery, 110 ff.

—, limitations of, 33 f.

*Diversity of Courts*, 67, 160.

*Doctor and Student*, 67, 85, 157.

Duress, 23, 84.

'Early Chancery Proceedings', 67 ff., 86, 146.

Earnest money, 122.

Ellesmere, Lord, 82 f.

Evidence, Parol. *See* Parol.

Executors, Actions by and against, 56, 87, 102, 137, 157.

Fairfax, J., 66.

Fcoffees to uses, 121.

Feudalism, influence on the common law, 11, 153.

Fitzherbert's Abridgement, 43.

FitzJames, C. J., 42.

Fleta, 22.

Fortescue, C. J., 32, 53.

Fraud, in Deed, 23, 84.

Freehold, in chancery, 66.

Gavelkind, 19.

Germain, St., 158, 167.

Glanville, 18, 26.

Guarantee, 55, 132 ff.

Hale, 43.

Herle, 39.

Hillary, J., 26.

Holmes, O. W., 21, 60 f.

Huse, J., 153.

Hutton, L. C., 78.

Implied promise. *See* Promise.

Indemnity, 55, 135 ff.

Injunctions, 116, 146.

Innkeepers, 45.

June, J., 49 f.

Kent, Eyre of, 133.

King, as party to suit, 75 f.

King's Bench, 68, 75.

*Laesio fidei*, 163.

Land, Contracts concerning, 55, 116 ff., 165.

Langdell, Mr., 34.

Law of God, 157.

Law Merchant, 131, 154.

Law of Nature, 154.

*Lex mercatoria*, 131.

Litigation, Agreements concerning, 142.

London, Covenant in. *See* Covenant.

—, Custom of, 100 n.

Maine, 11.

'Maintenance', of rich suitors, 79.

Marriage, settlements, 123 ff.

—, promises of, 165, 167.

Married women, Contracts of, 56, 100.

Martin, J., 47 f.

Merchant, Law. *See* Law.

Metingham, J., 24.

Mordant, 152.

Morton, Archbishop, 152.

Mountgrace, Prior and Convent of, 74.

Moyle, J., 37.

*Mutuum*, 27.

Nature, Law of. *See* Law.

Newton, C. J., 46, 53.

*Nient son fait*, 23.  
Novation, 109.  
Novel disseisin, 11.

Oath, Examination under, in chancery, 147.

Parol contracts, treatment in chancery, 160 ff.

—, evidence, to vary instruments, 91, 93.

Parties to contracts, 75, 78.

—, in subpoena, 120, 126.

Partnership, 56, 128 ff.

Paston, J., 46, 48, 50.

Personal representatives, Actions against, 56.

—, services, Agreements for, 138 ff.

Petitions in chancery, nature of, 67, 70, 144.

Pleadings in chancery, nature of, 144 ff.

*Plagis de prosequendo*, 145.

Poverty, as basis of plea in chancery, 78, 98.

'Privileged places', 81.

Procedure, in chancery, 144 ff.

'Proceedings in chancery', 67, 69.

Promise, implied, 106.

Proof, in chancery, 147 ff.

Public Record Office, 67.

Purpose, Specific, of contract, 92.

*Quantum meruit*, 57, 107.

*Quantum valebant*, 57.

*Quid pro quo*, 32, 36-8, 97, 116, 124, 130.

'Real contract', 43.

'Reason and conscience', 83, 89, 92, 110, 155 ff.

—, in specific performances, 121, 127.

Receivers, 14.

Rejoinder, 146.

Relationship, as consideration, 128.

Replication, 146.

Rescission, 123.

Rickhill, J., 47.

St. Germain, 158.

Salmond, J. W., 21, 63 ff.

Seal, Contract under, 20 ff., 58.

—, consideration in, 96.

—, treatment in chancery, 71, 84 ff., 101, 158.

*Secta*, 38.

Security for debt, 89.

Selden Society Publications, 67.

Services. *See* Personal, Special.

Set-off, 57.

Sharshulle, J., 31, 37.

Smiths, Law as to, 45.

Special services, Agreements for, 140 f.

Specific performance, 116, 120 ff., 127, 165.

—, in Account, 16.

—, in Covenant, 18.

—, in Common Law, 57.

Spelman, J., 42.

Spence, Mr., 82.

Spigurnel, J., 22, 25.

Statute of Wales, 18.

Staunton, J., 30.

*Stipulatio*, 21.

Subpoena, 66, 68, 81, 98, 114, 117, 126, 145.

Suit, or *Secta*, 38.

*Supersedas*, 76.

Suretyship, 132 ff.

Tally, in Debt, 39.

Termor, Protection of, 17.

Tithes, 105.

Tort, and breach of contract, 161 ff.

Trespass on the case, 115, 170 f.

Uses. *See* Feoffees.

Variation of contract, by parol evidence.

*See* Parol.

Vendors, Petitions against, 114 ff.

Venue of contract, 76 f.

Wager of law, 99, 111, 124.

Warranty, Breach of, 115 f.

Westminster, Chancery jurisdiction in, 76.

Writs, Common law, difficulties of, 80.

Year Books, 64, 66, 124, 130, 150, 157.



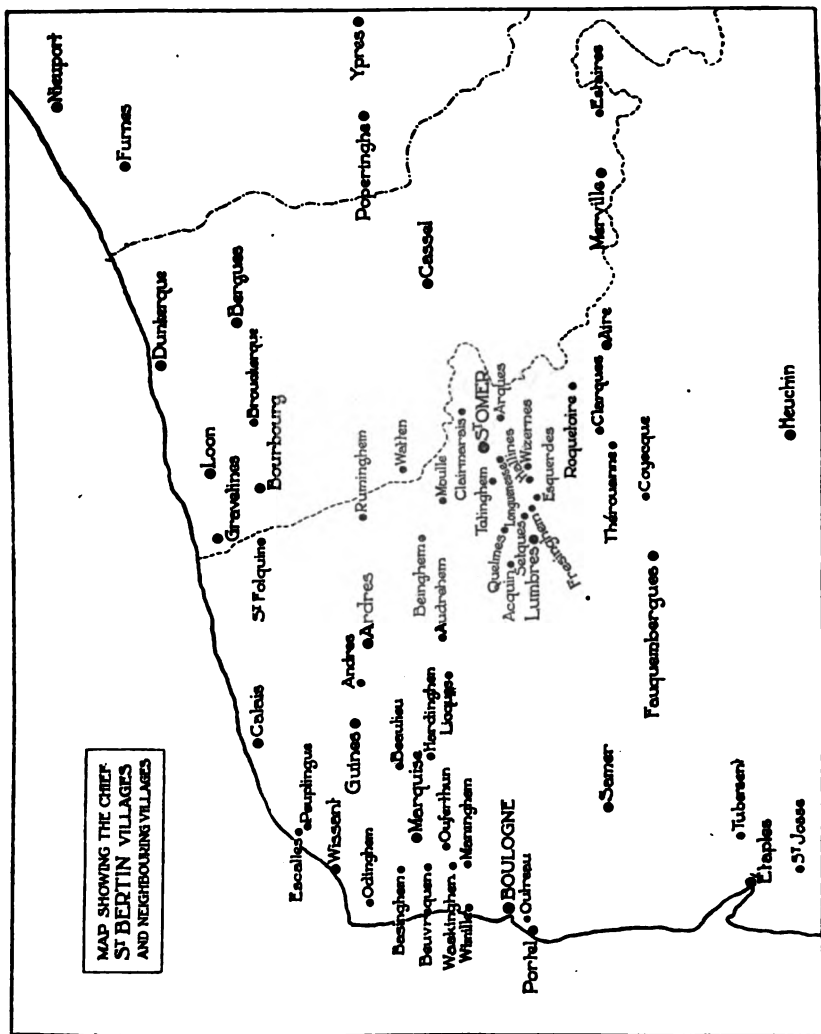
VIII

THE ABBEY OF ST. BERTIN AND  
ITS NEIGHBOURHOOD, 900-1350

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# CONTENTS

	PAGE
AUTHORITIES . . . . .	5
INTRODUCTION . . . . .	11
CHAPTER I. THE INVASIONS AND THE POLITICAL SETTING . . . . .	23
CHAPTER II. THE VILLA AND THE MANSUS AFTER A.D. 900 . . . . .	30
CHAPTER III. THE ECONOMIC SETTING . . . . .	45
CHAPTER IV. THE PEASANT AND HIS HOLDING. PART I. . . . .	63
CHAPTER V. THE PEASANT AND HIS HOLDING. PART II . . . . .	73
CHAPTER VI. STATUS. PART I . . . . .	91
CHAPTER VII. STATUS. PART II . . . . .	110
CHAPTER VIII. AGRICULTURE, 900-1350 . . . . .	117
CHAPTER IX. THE LAND-MEASURES. . . . .	127
CHAPTER X. THE RAPPORTS AND DÉNOMBREMENTS	141
CHAPTER XI. CONCLUSION. . . . .	147
APPENDIX I. PART OF THE RAPPORT FOR QUELMES, 1450 . . . . .	150
APPENDIX II. BIENS NATIONAUX RAPPORT, DIS- TRICT DE ST. OMER, CANTON D'EQUERDES, MUNICIPALITÉ DE WIZERNES . . . . .	154
APPENDIX III. EXAMPLES OF LAND-MEASURES . . . . .	159
INDEX . . . . .	163

## LIST OF MAPS

	PAGE
THE CHIEF ST. BERTIN VILLAGES . . . .	2
THE SINUS ITIUS OR GULF OF ST. OMER . . .	10
SOME OF THE VILLAGES OF ST. VAAST OF ARRAS IN THE 12TH CENTURY . . . . .	64
PLAN OF PART OF VILLAGE OF LUMBRES ON THE EVE OF THE REVOLUTION . . . . .	161

## AUTHORITIES

### A. UNPUBLISHED

#### I. (a) *Le Grand Cartulaire ou Recueil général des Chartres et Titres de l'Abbaye de St. Bertin.*

The Abbey of St. Bertin in St. Omer had by the middle of the eighteenth century existed eleven hundred years. The great accumulation of documents bearing on its history had until that time been jealously guarded from outside view. Towards 1770 there was entertained a project of publication which resulted in the transcription by the archivist, Dom De Witte, of the most important records.<sup>1</sup> His work was carried on under the supervision of Nicolas Gobet, 'garde honoraire des archives de Monsieur, frère du roi,' and of Dom Anselm Berthod; the 'notaires royaux' of Artois also attested its exactness. At the Revolution practically the whole of the priceless archives of St. Bertin disappeared or were destroyed. De Witte was able to save his transcript, which he treated as his private property; it is now in the Municipal Library of St. Omer.

The large folio volumes of which the Grand Cartulaire is composed are entirely in the hand of De Witte himself; at the end of each article are given the dimensions of the original in inches and 'lines', and where necessary a description or drawing of the seal is added.

The contents of the volumes are as follows :

<i>Date.</i>	<i>Number of Articles.</i>	<i>Number of Pages.</i>
1. 648-1200	433	622
2. 1201-1240	421	610
3. 1241-1294	449	828
4. 1295-1365	336	706
5. 1365-1407	490	786
6. 1407-1447	458	786
7. 1447-1473	391	705
8. 1473-1500	327	502
9. 1501-1578	468	603
10. 1579-1600	69	121

There follow after 1601 only a series of summaries of articles of dates 1601-1779; thence to 1801 this volume serves as a sort of journal of events in the monastery.

11. This volume had been prepared for the continuation of the Grand Cartulaire; it serves also as a journal for 1807, in which year De Witte died.

It should be added that De Witte, when carrying out his long task, had before him a series of chests in which the archives of the monastery were

<sup>1</sup> For correspondence on the matter see *Comité des Travaux Hist. et Sci.*, vol. i, 1886, p. 240, nos. 13 and 14; May, 1775.

classified according to a scheme of regions and of administrative departments. There are more than twenty districts in the list (the first is Angletterre), and several of these were subdivided.

The administrative classification included Aumônes, Bulls, Couvent, Fabrique, &c.

- (b) *Synopsis chronologica et alphabetica archivi S<sup>ti</sup> Bertini*, no. 804 in catalogue of Library of St. Omer.

This work forms a kind of index to the *Grand Cartulaire*; the entries for each village are grouped; thus for Quelmes under Couvent are 178 entries, under Grénéterie 235, &c.

- (c) The volumes of St. Bertin accounts, &c., in the Archives départementales at Arras.

These form apparently but a fraction of the Archives of St. Bertin, as they existed before the Revolution. The Abbé Haigneré speaks of them as '408 gros volumes', 'des charretées d'insipides registres, de maussades cueilloirs, de prolizes états de comptabilité.' In reality there are more than 500 volumes: they were carelessly bound in the first half of the nineteenth century and the name of the village on the cover is no safe guide to the contents. They date generally from after 1400. For the agricultural history of the region they are practically untouched. The volumes on Arques, Quelmes, Beuvrequen, Acquin, Poperinghe will serve as instances: for the last there are eighteen volumes.

- (d) The sixteenth-century *Centième Rôles*, e.g. Arques, 1559.

They contain for each village the list of landholders and the amount they hold: whether owner or tenant, the yearly value of the holding, the amount due as tax, &c., also the list of those having houses without land. There are rôles for 751 villages. (Arch. Dép. Arras.)

- (e) Various eighteenth-century 'rôles', e.g. *Vingtième Rôles*, Quelmes, 1757 and 1759, *Centième Rôles*, Quelmes 1760-1781.

There are rôles for 800 villages. (Arch. Dép. Arras.)

- (f) Village maps of various dates in eighteenth century and early nineteenth, e.g. Audrehem 1776, Quelmes 1807, Thérouanne 1760, Rumingham 1708.

A map of Eperlecques, dated 1759, is accompanied by a *Répertoire*, which gives a detailed description of the village, number of houses, farms, horses, area of arable, common, &c. (Arch. Dép. Arras.)

- (g) *Atlas des Dîmes sur lequel Messieurs le Doyen Chanoines et Chapitre de la Cathédrale de St. Omer perçoivent et recueillent la Dîme*.

A very beautiful work drawn up between 1776 and 1779. It includes maps of six villages in which only the 'terres limitrophes' are marked to scale. The names of the tenants of these lands are given in order and the total tithe is reckoned for each village according to three different prices of corn. (Bibl. munic. St. Omer.)

- (h) The existing 'Plans Cadastraux' to be consulted in the Mairie of the villages, or at the Bureau des Perceptions Directes at Arras.

- (i) The 'Biens Nationaux' lists. (Arch. Dép. Arras.)

These are arranged in packets, each containing the documents relating to one village. They generally include (i) the detailed list of lands held by the 'ci-devant' Abbey or other dispossessed owner; (ii) formal declaration of intention to purchase a portion of the said lands; (iii) an account of the sale 'by candle' with names of purchasers. The set is generally incomplete—cf. those for Quelmes, Wizernes, Coyecques, Acquin, Audrehem, Wisques, Arques, and Baingthun. At Poperinghe in Belgium are a number of account books, &c., including a 'biens nationaux' list of the lands held by St. Bertin.

## II. Archives du Chapitre de St. Omer (preserved at the Bibl. munic. de St. Omer).

An incomplete manuscript catalogue made by Giry is in three cases or volumes. The first is paged 1-370 (pp. 1-180 printed), the second and third are not paged. The classification is by Register or liasse under G. II (Clergé séculier). There are more than 3,000 'pièces'.

The following are examples of volumes :

G. II, no.	53.	Grand Cartulaire du Chapitre (1059-1717).
" "	54.	Petit Cartulaire du Chapitre (1075-1328).
" "	399.	Register of receipts (1470-1497).
" "	861-99.	Register of receipts and accounts.
" "	1082.	Terrier de la bourse commune.
" "	1154.	Comptes de la Cave, &c.
" "	1992	} Terriers or Fragments of Terriers.
" "	1996	
" "	1997	
" "	1998	
" "	2002	

As an example of accounts of a village we may take those for Blendecques :

					<i>Anno.</i>
G. 2143	pp. 65	.	.	.	14th cent.
2144	164	.	.	.	1431-1450
2145	129	.	.	.	1461-1476
2146	207	.	.	.	1462-1470
2147	276	.	.	.	1471-1490
2147 bis	48	.	.	.	1483-1487
2148	218	.	.	.	1493-1500
2149	216	.	.	.	1501-1520
2150	323	.	.	.	1506-1589

and so on to the Revolution.

From the liasses may be cited nos. 105, 196, 197, 249 (A. D. 1114), 826, 827, 828, 1899, 1908, 2292, 2295 as containing documents of interest; also many bundles of tithe receipts, &c.

The Archives include about fifty unclassified maps and plans, e.g. Quelmes, showing farm of Inglebert, July 25, 1754.

## B. PUBLISHED

A useful list of cartularies will be found in Sée, *Domaines rural*. The following have been largely used for this essay :

- Chartularium Sithiense. Guérard, 1841 ; Morand, 1857.  
 Chartes de St. Bertin. Haigneré et Bled, 1886, &c.  
 Chartes de l'Abbaye de Beaulieu. Haigneré, 1886.  
 Chartes de l'Abbaye de Licques. Haigneré, 1890.  
 Chartes de l'Abbaye de Samer. Haigneré, 1880, 1886, 1894.  
 Un Cartulaire de St. Vaast d'Arras. Guesnon.  
 Cartulaire de l'Abbaye de St. Vaast d'Arras (Guiman). Van Drival.  
 Cartulaire de l'Évêché d'Arras. Mém. Acad. Arras, 1902.  
 Cartulaire du Chapitre d'Arras. De Loisine, 1897.  
 Cartulaire de N.-D. des Ardentes à Arras. 1896.  
 Chron. et Cartulaire de l'Abbaye de Bergues St. Winoc. 1875.  
 Cartulaire de N.-D. de Bourbourg. Coussemaker, 1882-91.  
 Extraits du Cartulaire de l'Abbaye de Watten. Coussemaker, 1886.  
 Recueil des Chartes du Prieuré de St. Bertin à Poperinghe. D'Hoop, 1870.  
 Chron. et Cartulaire Abb. S. N. Furnensis. 1849.  
 Chron. Andrensis monasterii. Spic., t. ii, pp. 781-871. 1723.  
 Cartulaire de Cysoing (867-1783). Coussemaker, 1883.  
 Le Prieuré de St. André lès Aire (1202-1793). Le Comte de Brandt de Galametz.  
 Cartulaire de St. Barthélemy de Béthune. Le Comte de Loisine.  
 Cartulaire de la Chartreuse du Val de Ste. Aldegonde. Justin le Pas.  
 Cartulaire de l'Eglise de Théroutanne. Duchet et Giry.  
 Chartes de l'Abbaye de Sainte Wandru de Mons. Devillers.  
 Cartulaire de Crémarest. Haigneré.  
 Cartulaire de l'Abbaye d'Auchy. Bétencourt.  
 Cartulaire de l'Abbaye de Flines. Hautcœur, 1873.  
 Cartulaire de l'Hôtel de Ville de Boulogne. Haigneré, 1886.  
 Hist. des Abbayes de Dommartin et St. André-au-Bois (Documents). De Calonne.  
 Abbaye de la Chapelle. (Pièces justif.) Desplanques. Annales du Comité flamand, ix. 367.  
 Cartulaire et abbesses de la Brayelle d'Aunay de 1196 à 1504. Demarquette, 1885-6.  
 Cartulaire de l'Eglise collégiale de St. Pierre de Lille. Hautcœur.  
 Cartulaire de St. Jean en l'Estrée. Richard. Soc. Acad. Arras, xvi.  
 Cartulaire de St. Lambert de Liège. Bormans et Schoolmeester.  
 Chartes de l'Abbaye de St. Hubert-en-Ardenne. Kurth, 1903.  
 Reg. des Evêques de Théroutanne. Bled.  
 Cartulaire du Chapitre de la cathédrale d'Amiens. Soc. Antiq. de Picardie, t. xix, 1897.  
 Cartulaire de l'Abbaye de Val-Benoît. Cuvelier, 1906.  
 Cartulaire d'Orval. Goffinet, 1879.  
 Cartulaire de St. Trond. Piot, 1870-4.  
 Chartes de l'Abbaye de St. Martin de Tournai. 1898-1901.  
 Cartulaire des Comtes de Hainaut. Devillers, 1881-96.  
 Actes et Doc. anc. intéressant la Belgique. Duvivier, 1903.  
 Chartes relatives à la collégiale de Lillers. Bull. Soc. Ant. Mor., vol. iii.  
 Hist. de l'Abbaye de Chocques (Pièces justif.). Robert.  
 Chartes du Prieuré de Renty. De Bonnecove et Haigneré, Bull. Soc. Ant. Mor., vi, viii.

The following have been used chiefly for comparison :

Polyptyque d'Irminon.

Cartulaires de Notre-Dame de Paris; de St. Victor de Marseille;  
de Grenoble; de Cluny; de Savigny et d'Arnay; de Beaulieu (en  
Limousin); de Redon en Bretagne; de Brioude, &c.

Recueil des Actes de Philippe I<sup>er</sup>, 1059-1108.

Définitions du Chap. gén. de Cluny, 1323.

Les olim, 1254-1311.

Catalogue des Actes de Philippe Auguste.

#### MISCELLANEOUS

Histoire généalogique des Maisons de Guînes, d'Ardres, &c. Duchesne,  
1631.

Coustumes générales. Montreuil, 1512; Boullenoy, 1541; d'Artois, 1679;  
de St. Pol, 1692; Guysnes; Arras, 1746; St. Omer, 1744, &c.

Cahier des doléances de 1789. Pas-de-C. Lorient.

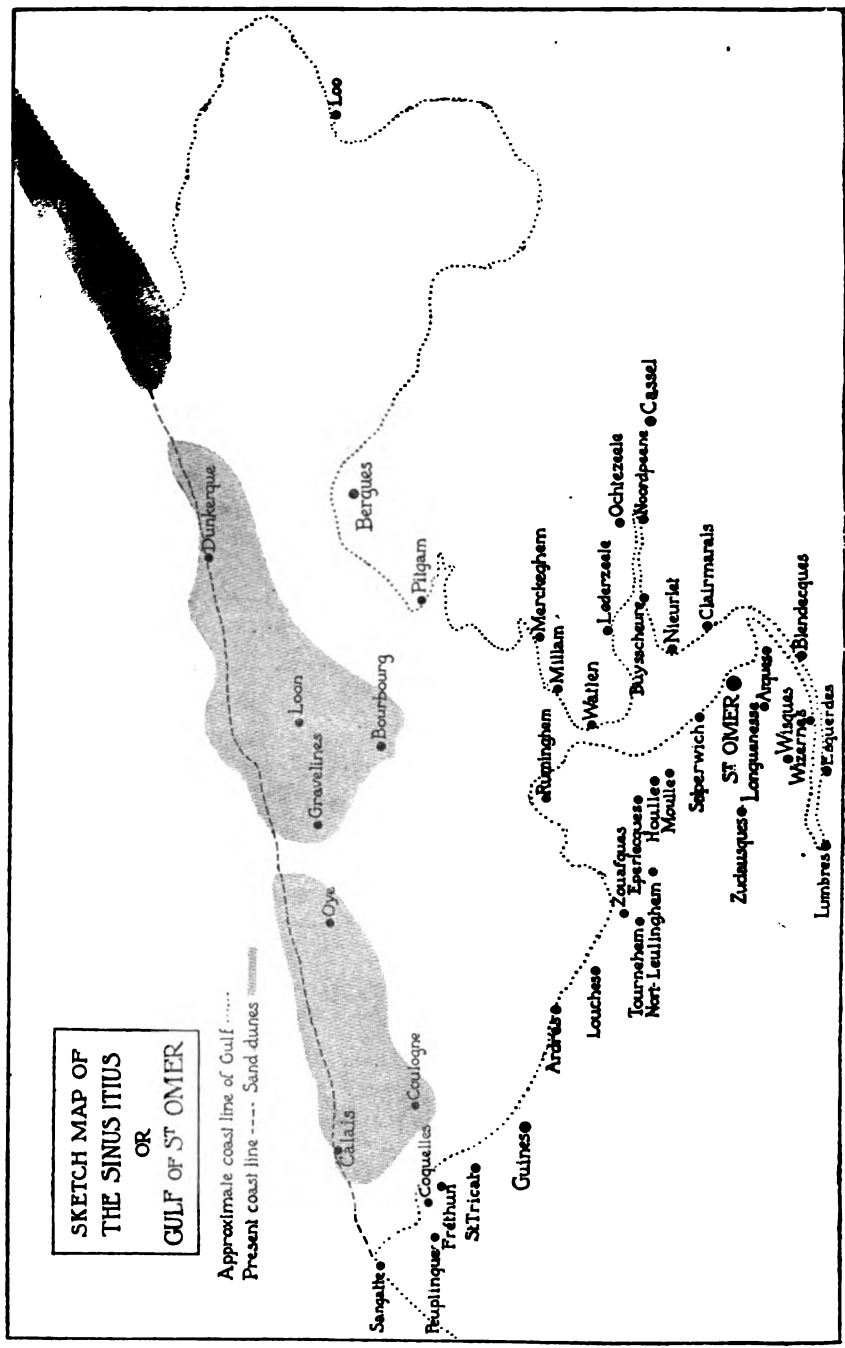
Dictionnaire historique et archéologique du Pas-de-Calais, 1873-84.  
15 vols.

The publications of the Society of Antiquaries of the Morinie and of the  
Academy of Boulogne are of the greatest value for the history of the region.

For the general literature of the subject see the works of Flach, Viollet,  
Glasson, Luchaire, Pfister, F. de Coulanges, D'Arbois de Jubainville,  
d'Avenel, Langlois, Kurth, Desjardins, Luce, Levasseur, de Foville,  
Pirenne, Souchon, Longnon, Sée, Flour de St. Genis, &c.

SKETCH MAP OF  
THE SINUS ITIUS  
OR  
GULF OF ST OMER

Approximate coast line of Gulf .....  
Present coast line ---- Sand dunes



# INTRODUCTION<sup>1</sup>

## I

### PHYSIOGRAPHY OF THE DISTRICT

THE villages with which this essay deals lie, roughly, within a circle of radius thirty miles, having its centre at the town of St. Omer. Two reasons have suggested the choice of this group lying in a comparatively narrow area. Firstly, a considerable amount of information is available concerning them; secondly, situated on what is a geographical frontier, they illustrate the characteristics of the villages of a much wider region—that extending from the Somme to the Scheldt.

Some of them lie in those 'low countries' which begin in the above-mentioned circle; others in higher and older country, which is definitely distinct from the low countries. They look at the same time towards the Scheldt and the Somme; they have been Celtic, Roman, German, English, and Spanish, in turn; Norman and Dane have influenced their progress; thus it is permissible to think that in tracing their development we are focussing, as it were, our study of the whole region. In no part of Europe is History, both economic and political, so closely bound up with Geography and Geology as here. Geographically, the region is a meeting-place of routes by sea and land; geologically it is, more especially in its northern portion, a new country whose progress has consisted largely of the slow change brought about by human agency in the conditions which existed when history began.

<sup>1</sup> While writing the ensuing essay I have been much indebted to the generous assistance of the Abbé Bled, of the Société des Antiquaires de la Morinie, who placed the results of his long study of local history entirely at my disposal; of M. Lavoine of the Archives Départementales at Arras; of the officials of the many villages of the region; of Miss L. V. Vass, who aided me in revision.

To the late Dr. Seebohm I owe a debt of profound gratitude for the help and encouragement which he afforded me in the early stages of the work.

A meeting-ground of races, a region to be colonized and reclaimed from sea and forest: these are the two salient characteristics of this region which confront us throughout the twenty centuries of its history.<sup>1</sup>

In a remote geological period the whole north of France was represented by the Primary rocks of Brittany and the Ardennes; these in their turn had emerged from the sea later in time than the great Plateau known as the Massif Central. In succeeding ages the area between Brittany and the Ardennes was slowly laid down in unbroken connexion with the corresponding strata in the British Isles.

A line of low hills from Cambrai by Lens and Béthune to the sea, represents ancient earth foldings which served to separate the London and Paris basins as they came into existence in Tertiary times. This separating ridge extended into what is now Hampshire. The most striking of the anticlines has received the name of the Heights of Artois; of the synclines the most important is the valley of the Somme. To the north-west the Heights of Artois extend and rise to a greater height; the chalk has often been removed from the summits and the inferior layers exposed as in the English Weald. A region of distinctive character has here been formed between Picardy and Flanders. This area, the Boulonnais, was a forest region, and presents well-marked differences from the low flat district into which it merges near Guisnes.

Near Marquise, on the railway-line from Boulogne to Calais, the earth movements have been sufficiently violent to expose primary rocks; and those strata which lie buried in the whole area between the Ardennes and the Boulonnais appear here for a moment at the surface.

A little further than Marquise, at Landrethun, we are on the edge of the chalk ridge again, and the low countries are spread before us.

At a time much later than that in which the London and

<sup>1</sup> The geological section is based on P. Vidal de la Blache, *Tableau de la géographie de la France*: tome i, pt. 1 of *Histoire de France* (Lavisse); and O. Barré, *L'Architecture du sol de la France* (1903), ch. 2, Région du Nord et du Nord-Est.

Paris basins were laid down, the sea broke through this ridge, which had for long ages served to separate them. The creation of the Straits of Dover had important results for the regions with which we are dealing. The action of the Ocean on the Paris basin had been considerable; an arm of the sea had penetrated to where, on a sandy soil, the Forest of Fontainebleau now stands. With the breaking through of the straits, this action appears to have been modified, while at the same time it was intensified on the region lying to the north of the dividing crest.

As the region lying between the estuary of the Scheldt and the Boulonnais emerges into the dim light of early history, we find a country made up of arms of the sea, desolate marshes, and heath lands. The most clearly marked of these arms of the sea, the Sinus Itius, or Gulf of St. Omer, which covered the triangle of land between Sangatte, St. Omer, and the point where the Belgian frontier touches the sea, calls for closer examination.<sup>1</sup>

The Sinus Itius followed the Roman road from Sangatte to Guînes, Ardres, and Tournehem; washing the foot of the high ground of the village of Ruminghem, it continued to Watten. Here was a lighthouse two thousand years ago, and the Chronicler of Watten, writing towards the end of the twelfth century, speaks of the vast remains of buildings then before his eyes. In that age water covered part of the territory of Eperlecques, Houlle, Moulle, Serques, and Salperwick. The map of Eperlecques about 1759 represents one section of the village as still being under water during part of the year. The sheet of water encircled the foot of Mont Sitdiu at St. Omer, and then turning to the south of Longuenesse and Wizernes formed a narrow branch up the valley of the Aa to Lumbres. On the southern shore of this arm was Blendecques. Thence the sea touched Arques, Clairmarais, Nieurlet, Buyssechre, Nordpeene, and Lederziele. The

<sup>1</sup> See for the Gulf of St. Omer many of the notices of villages in *Dict. Hist. du Pas-de-Calais*; note 3, pp. 388-90, of Desjardins, *Géogr. de la Gaule romaine*, and plate xv *ibid.*; vol. x of *Annales du Comité flamand de France*; *Voyage en France*, vol. xix, ch. 8, vol. xviii, ch. 9, 12, 13, 17.

coast of solid ground here turned in a north-western direction to Watten, then by Millam, Merckeghem, to Pitgam. Hence the gulf spread over the low-lying land as far as the Roman road which led from Cassel to Langhem and thence to the point where the town of Loo now stands. On the side of the sea, the gulf was, to a certain extent, landlocked by stretches of dune and alluvium ; on these, later, Calais and Dunkerque arose.

We have traced here the outline of a configuration which was a serious obstacle to progress east and west, but which opened at the same time a path far into the land for the inroads of Northmen.

In the chronicles and cartularies of the region we shall find ample evidence as to its wild and impassable condition at a much later period.

Behind this belt of marshland the slightly higher ground has little to distinguish it in appearance from the land of the Paris basin, which lay to the south of the line of the Somme. In reality there are differences of geological structure which have had a most important effect on the economic development of the two areas. In the more southerly portion of the basin the older strata have a comparatively shallow covering ; the older rocks slope more sharply to the Scheldt than the covering layers. Consequently, as we go further north the subsoil lies at an increasing depth. It is only through centuries of labour in bringing the subsoils to be mixed with the surface soil that the famous Waesland between Antwerp and Ghent has been made fertile. The traveller from Antwerp to Maaseyck by the great Military Camp of Bourg Léopold sees the stretches of heath and thin pine woods which testify to this barrenness of the upper soil when untouched by human agency. Similar evidence is offered by the desolate country between Thourout and Bruges. Thus the northern portion of Flanders was sharply differentiated from the Flanders of Ypres, Courtrai, and Cassel. The great industrial and commercial region of Ghent and Bruges owes its origin to artificial causes ; it depended on the region further south for its supplies of food, and the two regions developed side by

side. Northern Artois and Southern Flanders served as the granary to this other Flanders, whose prosperity was based on its geographical situation on the cross-roads of Northern Europe.<sup>1</sup>

We have spoken of the forest which covered the Boulonnais. It was continued to the Canche on the south, and to the Lys on the south-west. Its limit was the sea in the Boulonnais, and the modern map shows patches of forest which are the remains of the stretch which lay along the edge of the sea and marsh belt. Théroutanne, thirteen miles by road from St. Omer, lay in the Silva Tristiensis which occupied the greater part of the diocese of which Théroutanne was the centre. Similarly round Bailleul lay the great wood of Beyla.<sup>2</sup>

The tradition concerning St. Wulmer, who founded the Abbey at Samer in the seventh century, shows him on his way from Cassel to the neighbourhood of Boulogne, traversing an immense forest, which had probably since Roman times regained much of the area previously cleared.<sup>3</sup>

## II

### THE RISE OF THE GREAT MONASTERIES OF THE NORTH-EAST

St. Omer, when in 638 he summoned St. Bertin, St. Momelin and St. Ebertran from Luxeuil, did so that they might be entrusted with the task of re-establishing the faith and extirpating paganism from the land of the Morini.

By the end of the seventh century the great monasteries which were to stand as outposts of religion and civilization in the southern portion of the region between the Somme and Scheldt had been established: Corbie, in the early years of the century, in the reign of the second Clotaire; St. Bertin in 640; St. Père at Chartres c. 650; and the monastery of Hautmont

<sup>1</sup> *Étude géographique de la Plaine flamande*, R. Blanchard, 1906.

<sup>2</sup> See Desjardins, *Géog. de la Gaule romaine*, i, p. 433, &c., and *Annales forestières* (1850), p. 49.

<sup>3</sup> Introd. to *Cart. de Samer* (Haignère).

near Mauberge in 650. From Hautmont, Wulmer founded that monastery of Samer where Cadwalla, King of Wessex, going to Rome for baptism, stayed in the year 688 or 689.

The first diploma of St. Vaast at Arras is of date 697, and a little earlier were founded offshoots from St. Bertin at Wormhoudt and Blangy-sur-Ternoise.

The foundations of this period in the region nearer the Scheldt were destined to fall before the inroads of the Normans, and their real activity dates from their revival in the eleventh century, contemporary with that second movement in the St. Omer region which resulted in the foundation of Licques, Beaulieu, Ardres, and Andres.

In the year A.D. 648, in the reign of Louis, son of Dagobert, Adroaldus, a proprietor in the region of Théroutanne, gave his possessions to St. Bertin, St. Mommelin, and St. Ebertran for the purpose of founding a monastery. The possessions consisted of his villa, called Sitdiu, and other villas situated in the neighbourhood of the spot where St. Omer now stands. The donation takes the following form :

‘Propterea vobis in Christo patribus dono, per hanc epistolam donationis, in pago Taroanense, villam proprietatis meae nuncupante (*sic*) Sitdiu supra fluvium Agniona cum omni merito suo, vel adiacentiis, seu aspicientiis ipsius villae. Haec sunt: villa Magnigeleca, Wiciaco, Tatinga villa, Amneio, Masto, Fabricinio, Losantanas, et ad Fundenis, seu Malros, Alciaco, Laudardiaca villa, Franciliaco, cum omni merito eorum: cum domibus, aedificiis, terris cultis et incultis: mansiones cum silvis, pratis, pascuis, aquis aquarumque decursibus, seu fari-nariis, mancipiis, acculabus, greges cum pastoribus, mobilibus, immobilibus, vel quibuslibet beneficiis.’<sup>1</sup>

For the present we need emphasize only these points :

- (a) That the gift is of villas.
- (b) That with the villas are included, at all events, certain of their inhabitants, and that the formula is made to include all that the villas can possibly contain within their limits of property other than human.

<sup>1</sup> *Chart. Sith.* I. ii and iii. That this donation is suspect detracts little if anything from its usefulness as illustrating an economic system: see *Mon. Germ. Script. Rer. Merov.* v, and *Analecta Bollandiana*, xxix.

(c) That the property given is not a huge estate forming one unbroken whole. The villas mentioned can be identified in only four cases, i.e. Wiciaco (Wisques), Ad Fundenis (Fontaine les Hermans), Alciaco (Auchi-les-Moines), and Sitdiu itself; but it is clear, even from these, that they were scattered.

Further, we may note that the donation is but one of hundreds of similar tenour made during the centuries from 450 to 750 in that portion of Western Europe which extends from Prum and Mayence to the Atlantic and from Antwerp to Arles.<sup>1</sup>

For the next two centuries the history of St. Bertin resembles closely that of other great foundations of the time. New possessions were acquired by purchase and donation: royal grants of immunity gave extended powers, and appeared to convert these villas into distinct economic and administrative units.

In the *Breviatio*<sup>2</sup> of A.D. 850 we have for the first time a record which enables us to picture—if not fully, at least in broad outline—the economy of these villas as units of rural exploitation. We select for brief description those aspects of the system revealed, a knowledge of which is essential to full appreciation of later evidence.

### The *Breviatio* of A.D. 850

The exact nature of the document known as the *Breviatio* is defined for us in the heading 'Breviatio Villarum Monachorum Victus', and Foulquin introduces it by saying that the abbot has ordered him to enumerate the villas which have been set apart for the special service of the brethren, as distinct from those which had been distributed as benefices. The *Breviatio*, then, is not a complete register of the villas of St. Bertin, but merely part of such an inventory.

The list of lands, services, and revenues thus set apart mentions twenty-eight localities: of these, fourteen are villas the description of which must have covered a large part of the land in use at that time.

Geographically, these villas lie scattered from Poperinghe

<sup>1</sup> See Bréquigny et la Porte du Theil, *Diplomata, chartae etc. ad res Gallo-Francicas spect.*, ed. Pardessus, 1843-9.

<sup>2</sup> *Chart. Sith.*, Pars Prima, Lib. II. xv-xxxv.

across the modern Belgian frontier, twenty-five miles by road from St. Omer, to Tubersent, which lies inland from Étaples; and from Escalles, on the Channel coast near Blanc Nez, to Thérouanne, thirteen miles to the south of St. Omer.

The general character of the description which Foulquin considered necessary will be seen from the section of the *Breviatio* dealing with Quelmes, an isolated village about seven miles from St. Omer :

'In Kelmis habent monachi ecclesiam 1 ac bunaria XII, et mancipia VI, luminaria IIII. Unusquisque solvit de cera valente denarium 1 Mansum indominicatum cum casa et aliis castitiis; de prato bunaria XXXVIII, de terra arabili bunaria CLXXX, de silva grossa bunaria XXX, de silva minuta bunaria XV. Mansa XV per bunaria XII et ille dimidius per bunaria VI, cum servis X qui faciunt in ebdomada III dies: et ancillae VI faciunt ladmones VI, aliae ingenuae facit unaqueque ladmonem dimidium, unusquisque parat de brace modia X, de farina VI, pullos III, ova XX. Ad vineas unumquodque annum carros II. Lunarii XVI, prebendarii VII. Ded habet bunaria VI, arat bunaria II.'

In this short paragraph we have the domanial system of 850 presented in miniature. It may conveniently be resumed under the heads of—I. Matériel or outfit of the villa; II. Tasks and Payments; III. Personnel.

### *I. Outfit of the villa.*

The mansus indominicatus is that portion of the villa which the proprietor has reserved to be cultivated under his own immediate control: it is distinguished from the portion which he has assigned to dependents of various grades in return for services, chief of which is that of cultivating the land reserved. This is the essential and characteristic division of villa territory as it appears in the ninth century. The bulk of the terra dominica is always arable, but there are included also varying proportions of wood and meadow. Here, as throughout the *Breviatio*, we are confronted by a system which is by no means of recent origin. We have the irregular results of a series of transactions extending over many centuries.

After the terra dominica the *Breviatio* generally deals with other mansi, which also include wood and meadow. In some

cases they are described as being still part of the terra dominica (*Tremharius maior habet casam indominicatam cum aliis castitiis*). We have here an illustration of one method by which the Demesne land diminished in area; it is unlikely that such parts reverted to the Domain.

What we have called the normal mansus is the typical dependent holding of the villa. Mansi of this kind are enumerated in the Breviatio in four connexions. They may be (a) immediately connected with the Demesne or with a farm which, though not cultivated by the Abbey, has not lost the title of Dominicus, (b) attached to one of the larger farms not on the Demesne, (c) isolated on a villa where the Abbey possesses no terra dominica, (d) attached to a church. The same general description will apply to all.

The numbers are, for eleven villas,  $15\frac{1}{2}$ ,  $24\frac{1}{2}$ ,  $18\frac{1}{2}$ , 21,  $47\frac{1}{2}$ , 18, 15, 16, 16, 10, 18, corresponding to an area retained in Demesne of 180, 200, 120, 160, 158, 159, 98, 148, 82, 53, and 157 bonniers. Of about 250 mansi, more than half, 136, are of the area of 12 bonniers. In nine villas there are mansi of this area only. At Coiaco all the 21 mansi are of 10 bonniers; at Pascalanda all of 20 bonniers. On three villas only we have considerable variety. At Poperinghe there are  $47\frac{1}{2}$  mansi; 4 are of 12 bonniers, 10 of 24, 20 of 20, 17 of 13, and a half mansi is of 8 bonniers. At Wizernes there are mansi of 10 and 9 bonniers, and at Gisna of 8, 9, 7, and 11 bonniers.

The classification of the mansus as *servilis* or *ingenuitis*, which appears in other documents of the age, is not used in the Breviatio. There exist, however, in every villa but one, mansi occupied by servi and ingenui. The total for ten villas gives 96 mansi occupied by servi as against  $107\frac{1}{2}$  occupied by ingenui. This case of Poperinghe is extreme, with 4 servi for  $47\frac{1}{2}$  mansi.

Between thirty and forty small tenures presented themselves to the compilers of the Breviatio as requiring separate treatment. They are almost always of the area of less than 5 bonniers. Almost always, the sub-payment exacted from their tenants is the ploughing of some part of the Demesne.

For four villas we read that there was *de pastura communi*

*sufficienter*. Nothing is said as to the rights of the humbler tenants in wood and common.

## II. Tasks and Payments.

The services and payments due from the tenant to the monk may be classified in the first place as—

A. Labour in various forms.

B. Payment, whether in kind or money.

Labour services fall into two well-defined subdivisions:

1. In the first, the time expended by the tenant is the predominant element in fixing the amount of labour. It may be either—

(a) week work;

(b) seasonal work.

In the second, the amount of work is the chief element; it includes—

(a) ploughing, reaping, and enclosing a defined area;

(b) carting;

(c) certain special services;

(d) the exercise of a particular trade or occupation, as that of carpenter, smith, shepherd; and, in the case of women,

(e) the manufacture of a certain quantity of cloth.

Of these various services we need emphasize here only the work measured by time. The *ingenui* who hold *mansi* are required to do two days' work per week on the reserve; the *servi* in occupation of similar holdings do three days of such labour. The *mansi* which have been allotted with the larger holdings to tenants, apparently of superior grade, are also liable for similar work, which, in this case, is performed for them by their *mancipia*. Besides the tenants of *mansi*, whether *servi* or *ingenui*, others are called upon for week work. Thus at Atcona seventy-four men owe two days per week; we are told nothing as to their situation, as to the extent of their holdings, nor whether the two days' work per week is the full extent of their liabilities.

The payments in kind are usually connected with the *mansi*. The formula is, *unusquisque parat de brace modia X, de farina VI, pullos III, ova XX*. This contribution was

probably paid by all mansi, whether occupied by servi or ingenui.

### III. Personnel.

The classification of the dwellers in the villa is neither complete nor systematic. The Breviatio is concerned chiefly with services and payments. The status of those paying is not important, except in so far as it makes book-keeping easier by enabling the compiler to dismiss the whole of one group paying the same dues or services. If we may judge from later records, the archives of the Abbey in 850 would include lists of tenants grouped according to status.

The terms used in the Breviatio are *ingenuus*, *ingenua*, *servus*, *ancilla*, *mancipium*. Other terms are derived simply from the particular form of tribute due or the purpose to which it is destined, e.g. *luminarii*, *lunarii*, *herescarii*. The ingenui are mentioned in identical terms in the record of nine villas. In each case they are described as inhabiting certain of the mansi which depend immediately on the mansus indominicatus. Their duties and payments vary little from villa to villa. They owe always two days per week, and the mansus owes malt, flour, eggs, and poultry. So far as the Breviatio shows, there is but the one day's work a week to distinguish them from the servi. The ingenuae are of corresponding status and are responsible for supplying a half ladmon, representing a certain quantity of woven cloth per year.

The 114 persons qualified in the Breviatio as servi inhabit in every case mansi described together with those cultivated by the ingenui. 109 of the 114 owe 3 days' work per week; the remaining 5 at Scala do only 2 days. These mansi pay the same rent in kind as those of the ingenui.

*Ancilla* is the feminine form corresponding to the masculine *servus*: it is clear from the figures of the Breviatio that the status of husband and wife is not necessarily the same in 850. The ancilla owes one ladmon per year.

Of the words denoting status, *mancipium* is used with the widest meaning. The mancipia of St. Bertin are by far the

most numerous class mentioned: there are 111 at Morningahem alone, and more than 300 for the whole record. In the majority of cases the *mancia* are recorded in connexion with the larger holdings of those tenants who possess wood, pasture, and arable with or without dependent *mansi*. They provide the labour necessary for the work of cultivation: they also perform whatever tasks are due from these *mansi* to the Abbey. At the villa Edenenas the monks had 10 *bunaria*; attached to the land are 10 *mancia*. Nine of them plough on the same villa 4 *bonniers*; they cart the crops from half that area to the monastery, and enclose 15 rods. They are held to 24 days' work in summer.

### Agriculture

The economy of the villa centred round the fact that the *demesne* was, in whole or in part, cultivated by the labour of the dependents of the abbey. As to methods of cultivation, our knowledge is derived chiefly from what obtained in later times in this region. The villas were open-field. The dependent *mansi* were often composed of strips dispersed over the arable.<sup>1</sup> The *mansus indominicatus* was probably in part similarly dispersed. From such scanty evidence as survives, we may suppose that a three-field course was the one generally adopted.

We have then, in 850, the villa as a predominant unit of rural exploitation; within the villa the *mansus* as a fairly uniform holding; the labour performed by its tenant on the *terra dominica*; the presence of a population of varying status. These are the salient facts in the light of which we must examine the life of these villages in the succeeding age.

<sup>1</sup> In this part of France. For other regions cf. *Cartulaire de Savigny et d'Ainay* (Lyonnais), ii. (883), and *Cartulaire de Cluny*, nos. 8, 9, 13, &c. (ninth century); also *Cartulaire de Brioude*. In these instances the *mansi* were *not* dispersed, and a different method of description is employed.

## CHAPTER I

### THE INVASIONS AND THE POLITICAL SETTING

NOTHING is more difficult than to fix a point of departure in attempting to sum the earlier history of the peasant in this corner of France. We have tried to show some of the more prominent aspects of the villa as revealed by the Breviatio of 850. The accidental survival of evidence as to that year has, perhaps, made the mid-ninth century assume too much the appearance of a dividing-point. In reality, this particular moment was one of transition, and the picture revealed was that of a system already far advanced. The possession of evidence for this period is, however, a decided gain. We have seen the disappearing traces of a past system of personal slavery: the method of installation of dependent freemen on holdings has also gone far, and the line of future development is indicated. There are distinctions of status, but they are becoming obscured; the future is to bring complete fusion.

In the four centuries which follow the ninth, personal slavery disappears, and the rights of the proprietor of the domain relate more and more to the land rather than to its holder. The period is that in which serfdom, in the meaning usually assigned to the word, is firmly established; and that, too, in which, in this region, the institution itself decays.

For the greater part of the centuries in question, it is true to say that the typical inhabitant of these villages is in hereditary possession of land which he cannot easily quit; in the thirteenth century that condition is rapidly disappearing. In those earlier years, too, it is combined most often with personal dependence. In the thirteenth century this personal dependence is becoming the exception. We shall see in what form it lingered on in the early years of the fourteenth

century. We could wish to be more precise, but in this period the old and the new are strangely intermixed; what is the rule of 1300 is the exception of 1150.

The villa and the mansus lose their integrity. The former gives place, as a territorial division, to the parish. The latter gradually loses its importance as a central feature of the constitution of the domain. As time goes on, land becomes, as it were, fluid; custom, while still powerful, does not cover so much of the ground as previously. Contract enters in to replace and supplement it. In this period, too, there comes into existence an institution whose work is closely bound up with that of the domain.

The elements which were to combine and develop into feudalism had appeared in the Merovingian age. The reign of Charlemagne increased their strength whilst delaying their combination.<sup>1</sup> The age succeeding that of Charlemagne saw the apparently rapid formation of that feudal society with which the domanial system was to be closely linked. At the time of the Breviatio of 850 the change was not accomplished; the anarchy of the century 850-950 was to continue its progress, fostered from the inside by civil war, and from the outside by the invasions of Normans and Huns. Feudalism was the product of anarchy, and was itself *l'anarchie en permanence*.

We are familiar with the theory that feudalism was a useful and essential stage in the history of the Western nations; that it was born of the pressing needs of the time, and furnished the only possible protection of the weak against the strong; that it carried out an economic organization of the domain with the interests of the subordinate grades of society in view. If, however, we confine ourselves to this one region, we are led to consider that the vices of the system are more prominent than its usefulness. 'Protection of the weak,' during a comparatively short period, was followed by a long period when the chief obstacle to peaceable progress came from the side of the feudal system, for which the part of defender of the oppressed has been claimed.

<sup>1</sup> See especially Flach, *Les Origines de l'ancienne France*.

We are to imagine, then, the Artesian villages, during the tenth and eleventh centuries, as forming a passive portion of a disturbed feudal society. The invasions: the rapid decline of the Carolingian Monarchy under the immediate successors of Charlemagne: the formation of the local feudal powers: these are the events which fill the foreground of the picture. The background is obscure, and it is there that the humbler stratum of the population is working out its slow progress.

### The Invasions

The chapter of the Cartulary of Folquin which follows immediately on the Breviatio contains, as part of its heading, the significant expression, *de incursione paganorum*.

The few scraps of evidence which bear on the Norman invasion of this region must be supplemented by what we know of the practice of invading armies in this district in more humane times.<sup>1</sup> Always the villages were sacked, and sometimes they were sacked on what we may call the outward and the home march. A few days' pillage by an invading band must often have undone the work of years.

The Norman invasions began with the ninth century and continued far into the next. The feeble royal power was unable to offer any persistent opposition. In 852, Godfried, one of their leaders, led an army from the Scheldt to the Seine. In 859, the year in which Amiens was pillaged, they landed in the mouth of the Yser, near the modern Nieuport, and advanced to St. Bertin, drawn by the hope of capturing its treasure. They burned and devastated the country-side and destroyed the abbey buildings. In 878 the abbey was burned a second time, and Folquin records at the end of that year a *mortalitas hominum et pecorum magna*.

In 925 the Northmen were defeated at Falconberg after

<sup>1</sup> Cf. a document of much later date appended to the *Chroniques de Flandre et d'Artois* (Louis Bresin); *Analyse et extraits*, E. Mannier, 1880, p. 270: 'Relevé des villages qui ont été brûlés en le comté d'Artois par M. l'ammiral de France et autres capitaines des gens du roi en la course qu'ils firent devant Arras.' The list includes the number of houses burnt and remaining in each village.

having slain their captives (*quos de diversis locis sumpserant*) at the approach of a Frankish army.

The civil disorders which prevailed after the death of Charlemagne are sufficiently well known, and need not here be enumerated. It is easy to imagine the effect on that population which is described in the *Breviatio*, of this era of war and waste. Ransoms were extorted by the Normans; the troops of the king were scarcely less to be dreaded than those of the invaders. They plundered impartially *more normannico*, and the appeal of Adelard of St. Bertin to Louis the German, in 858, was against the king and his troops, rather than against the pagans.

As a consequence of the general unrest and want of security, markets were closed, and famine and pestilence were recorded year by year. The general lack of security did not cease with the Norman invasions, but was maintained by the struggle which led to the foundation of the Capet dynasty in 987, and by the various private wars in which the local seigneurs tried to establish themselves.<sup>1</sup> Among those who pay allegiance to an overlord to obtain a guarantee for the possession of their lands the peasant finds no place. The disappearance of royal power delivers him into the hands of the local master, and improvement in his condition is to come, not from recourse to a superior power, but from economic causes, the action of which that master was powerless to prevent.

The exact results of the Norman invasions are difficult to determine. The period comprised in the latter portion of the ninth century and all the tenth may be compared, in some respects, to the troubled time in which the Roman rule disappeared—just as the war, pestilence, and famine of the tenth and eleventh centuries recall the pages of Gregory of Tours. The complete blank in the evidence for St. Bertin from 960

<sup>1</sup> There are many references to this in the Cartularies; cf. *Guiman* (1177): 'Si autem terra illa in qua decimatio ista consistit Regis vel comitum Flandrie et Viromandie exercitu depopuletur vel etiam ab eis cremetur nuntiabitur nobis et eo anno quo devastatio vel crematio facta fuerit ab hac censura ecc. St. V. libera erit.'

And pp. 364-5: 'Si autem aliquo tempore predo, seu populator seu importunitas tyranni seu infortunium aliquod,' etc.

to 1021 is itself eloquent of the disturbed state of the region. So, too, is the ignorance displayed by the monk Paul of St. Père de Chartres, writing in 1000 A.D., as to the details of the earlier history of his monastery.

There is much difference of opinion as to how far the Normans made a 'clean sweep' of this region. M. Flach, for instance, considers that the land returned almost to its primitive state.<sup>1</sup>

That the whole of modern Belgium was laid desolate appears certain. The religious foundations which had resulted from the effort of the bishops of Maestricht and Noyon, seconded by those of Scottish missionaries in the seventh century, were destroyed; we are told that no fewer than eighteen convents were abandoned or plunged into misery and disorder. The monks of St. Bavon, at Ghent, took refuge after 853 at St. Omer and then at Laon; on their return they found almost complete desolation.<sup>2</sup>

In the region further south destruction was great, but probably not so radical as in Belgium. We know that the great abbey of St. Vaast, at Arras, suffered severely. In 890 its enormous possessions had been almost depopulated by the incursion of the Normans. Théroutanne was laid in ruins and the bishop fled to Boulogne, where for centuries the relics were guarded.

Towards 882 the monastery founded by Wulmer, at Samer, fell.

The family of the Counts of Guînes represents probably a permanent settlement of the invaders, and we seem to perceive dimly in the donation of these Counts in the eleventh century, that some of the lands apportioned were lands that had during the invasions relapsed into waste from the cultivation to which they had been subject in the ninth century.

<sup>1</sup> *Op. cit.*, ii. 70: 'Mais ce sont surtout les invasions étrangères du neuvième et du dixième siècle qui font table rase dans les campagnes.'

<sup>2</sup> See Paillard: 'Quels sont les changements que l'établissement des abbayes . . . ainsi que l'invasion des Northmans au IX<sup>e</sup> siècle ont introduits dans l'état social de la Belgique?'; and *Mém. Soc. Ant. Mor.*, x (1858), *Hist. des invasions des N. dans la Morinie*.

With the depopulation caused by the invasions, and the consequent retrogression of agriculture, we must connect the fact that, in the twelfth century, on many villas of the region from Arras to the sea, the *hospites* are more prominent than any other category of dependents.

We may trace briefly the formation of the political setting in which the villages of this region were to exist during the coming centuries. In 863 Charles the Bald made a marquise of the country lying south of the Scheldt and gave it to his son-in-law, Baldwin Iron-Arm. It included Flanders, the Pagus of Thérouanne, the Cité of Boulogne. At the accession of the House of Capet, the feudal houses of Guînes, Boulogne, and St. Pol make their appearance. During the next two centuries the Counts of Flanders consolidate their power, and by the middle of the twelfth century have succeeded in establishing themselves at Mans and Valenciennes, finding little serious opposition within the bounds of their country. The effect of their ambition was to expose the inhabitants of the district to further disturbance. In 1054 an imperial army devastated Flanders, and the long struggle of Robert le Frison and his sister-in-law continued the unrest during the second half of the eleventh century.

In this period of misrule the abbeys were often obliged to seek the aid of powerful laymen. To secure the peaceable possession of some of their lands and revenues they surrender part. The *advocati* are prominent in this period, and always as oppressors. It is in the person of these defenders of the Church, indeed, that the possibilities of feudalism in the way of oppression are revealed in this district.

We have, then, a period of nearly three centuries in which the condition of the rural classes is largely hidden by the confused process by which feudal society was slowly evolved from the ruins of monarchy. We may fitly conclude this slight introduction by the oath which the Bishop of Beauvais wished to impose on the neighbouring lords in 1023; it will serve to summarize the evils to which the peasant lay exposed during these years. It runs thus:

‘I will not carry off either ox, or cow, or any other beast of

burden; I will seize neither peasant nor merchant; I will not take from them their pence, nor oblige them to ransom themselves; I do not wish them to lose their goods because of wars carried on by their seigneurs, and I will not beat them to obtain their subsistence; from the Kalends of March to All Saints, I will seize neither horse, mare, nor colt from the pasture: I will not destroy nor burn their houses; I will not uproot the vines or gather the grapes under pretext of war; I will not destroy mills, and I will not take the flour therein, unless they are on my land, or unless I am on war service.'

We shall now attempt to describe the state of the villa, its constituent parts and its inhabitants, as they emerge from the age of war and invasion; to trace their progress during the twelfth and thirteenth centuries, and, by an examination in some detail of a village of 1305, to estimate the stage of progress at which the bulk of the peasants had arrived on the eve of the new period of disturbance by which this region was to be affected. Our division of the subject—under the formal heads of: the villa as unit; the services and payments due from its inhabitants; the inhabitants themselves—inevitably involves a certain amount of cross-reference and repetition. Such a division can, however, hardly be avoided, and an examination of a particular village at a given date may, perhaps, usefully supplement it.

## CHAPTER II

### THE VILLA AND THE MANSUS AFTER A. D. 900

#### I

#### THE VILLA AFTER THE NINTH CENTURY

THE tendency of the villa to persist as an integral unit of cultivation and of administration was already, in the ninth century, not unopposed by other tendencies which threatened seriously to affect that unity. Already certain parts of many villas were passing out of direct control as *beneficia*; and there were not wanting signs of organization lying, at least as units of cultivation, outside the self-contained villas to which the charters of immunity refer.

As the villa emerges from the semi-darkness which covers the second half of the ninth century and the entire tenth, it appears as an area in which authorities are curiously interlaced and subdivided. At this stage the integrity of the villa continues only with the continuance of the domanial system of cultivation. This change is largely bound up with the great process which we call the establishment of the feudal system. The subdivision and *morcellement* of feudal power must inevitably have tended to the breaking-up of the villa as it is shown in the documents of the Merovingian and Carolingian ages. We shall find rights of justice subdivided, *banalities* distributed into various hands, and the actual territory of the villa divided into fiefs and subfiefs. The Kelmis of 850 is, at a later time, divided into no fewer than 29 fiefs.<sup>1</sup> Hence the disappearance of that undivided control which had been one of the most striking features of villa organization. We have only to examine what the documents tell us of the doings of the advocati to realize how far this process went; and the institution of the advocati was one of the products of the age of anarchy.

<sup>1</sup> See the *Dénombrements* and *Books of Fiefs* of St. Bertin.

In the year 1056, Baldwin, Count of Flanders, is obliged to interfere to defend St. Bertin from oppression at the villa Arkas, which had been bestowed on the Abbey as early as 668. Certain men, usurping the title of *advocati* and wishing *vice versa* to oppress the Church they should have defended, had claimed, among other rights, to be lodged and fed in Arkas once or twice a year. Quite recently, the men of Gerbodo, *advocatus*, had treated with nameless cruelty a monk of St. Bertin sent thither on the abbot's business. Baldwin decides that, in future, the *advocatus*, when on expedition, is to have a side of bacon, a *pensa* of cheeses, a pack-horse, or, in place of these, a mark of silver. Further, from each holding of the villa he is to receive half a firton of oats per annum. The right of exacting payment from those who fed swine in the wood of Arques is to be left to the Abbey, and with it, a similar right over those who use the pasture known as *suinard*.<sup>1</sup>

A few years later it is the advocate of Calmont who oppresses that villa through the *major*, who is apparently under his authority. The maire, to curry favour with his master, maltreats the peasants (*ruricolos*). He seizes their oxen and presses them into the service of his master, keeping them three days at a time, and returning them worn out by the labour they have been obliged to perform. To remonstrances of the Abbey, the maire replies that if St. Bertin himself were an ox he would treat him similarly. The maire was miraculously afflicted as a punishment. But we see plainly into what kind of hands the peasant might at times be delivered.<sup>2</sup>

The villa of Poperinghe was a constant source of anxiety to the abbots of St. Bertin, lying, as it did, so far from the Abbey. Odo, who, as advocate, had introduced *pravas consuetudines*, died in 1107. His son Lambert, who inherited his feudal rights, asked for confirmation of the *ministerium* at Poperinghe. The abbot, considering the great injustice he had done, and how he had despoiled the

<sup>1</sup> *Chart. Sith.* xiii, xiv, Pars Sec., Lib. i.

<sup>2</sup> *Ibid.* xviii, Pars Sec., Lib. i.

Abbey of its rights of justice, refused. Finally the matter was arranged on condition of a solemn promise by Lambert not to repeat the injuries, and not to purchase land in the villa without permission of the abbot. He renounced the right of 'pand' (distress), and would in no wise interfere with the men of the Abbey at Poperinghe, unless by invitation of the prior who there represented the Abbey.<sup>1</sup> On other occasions it is against the advocate of Boulogne or of St. Omer that the Abbey is obliged to appeal to some higher power, Count or Pope.

These few instances are taken from a great abundance of examples. We may conclude with a summary of a charter of Baldwin of 1038. The foundation of St. Rictrudis, at Marchiennes, had always been free from all dues to an advocate. But, *praevalente seculorum nequitia*, it is necessary that the Abbey should have a defender. Two mills and two carucates of land are therefore transferred to Hugo Havet d'Albiniaco on condition that he should help the Abbey as *promptus adjutor*. In return for those services he is to receive, in those cases where the Abbey has called for his aid in the administration of justice, half of the fines: otherwise, nothing. The maires of the villas owe him annual gifts of wine and poultry. In time of siege or war, he receives from each caruca 2s.; from the half caruca, 1s.; from the manual worker, 3d. On royal service he is to receive eight equipped horses, which are to be returned at the end of the expedition. He is to exact no *corvées*. He is not to dwell on any villa of St. Rictrudis against the will of the abbot, nor to hold pleas there, nor to exact money from the inhabitants; nor is he to purchase land or to receive it as a pledge; he is forbidden to give serfs and ancillae to be held feudally by his knights.

We may note, as showing that this document is fairly representative, that it is signed by Baldwin himself, by the Counts of Boulogne and St. Pol, by the Bishops of Cambrai, Thérouanne, and Amiens, by the Abbots of St. Vedast, St. Bertin, St. Amand, among others.<sup>2</sup>

<sup>1</sup> *Chart. Sith.* xxxvii, Pars Sec., Lib. ii.

<sup>2</sup> App. xxi to Guérard's *Polyptyque d'Irminon*.

We may conclude that in no case at this time was the territory of the ancient villa under the undisturbed control of one lord. An examination which we must undertake in connexion with the mansus will show how far the splitting up of the villa went on in this age.

Mills, bakehouses, woods, rights of justice, tithes, might all be in different hands; and the services and payments of the inhabitants are no longer made to one authority only. Feudal and domanial payments are mingled; and the duty of watching at the Count's castle falls to the share of the peasant, along with the services and payments more essentially connected with his tenure.

We have said that the villa continued as the unit of rural exploitation: it is probable, however, that in one important respect a great change took place in the villa considered from this point of view. We shall see, when dealing with services, that there is reason to suppose that the characteristic week-work disappeared early in this region. We can assign no exact date, but certainly when, in the eleventh century, evidence becomes more exact, week-work has disappeared. We have referred to the appearance in the eighth and ninth centuries of transactions in small pieces of land and detached mansi, which must have played some part in the disintegration of the villa. It is true that donations often referred to fractional parts of villas, but even in these cases the complicated system of accounts which such division would require could hardly survive the disorders of the tenth and eleventh centuries.

The word *villa* in the documents of this region is constantly employed, at least until the middle of the thirteenth century. About 1250, the word *parochia* is used side by side with it, and becomes more frequent as time goes on, until it becomes the common designation of what is later termed a village.

The few mentions of the villa in the St. Bertin Cartulary for the tenth century show it, to all appearance, unchanged. Those of 938 and 962 are identical with earlier ones; the same is true of those of 1026, 1036, and 1057. In 1084 donation

was made of the third part of the villa of Ostreseld.<sup>1</sup> The gift by four brothers in 1119 of the fourth part of the villa of Calvasart apparently does not refer to the fourth of an undivided villa. The formula is *tam in agris quam in silvis et aquis et campis*, with no mention of inhabitants or rights as in earlier documents; and the donation is confirmed by the brothers, who, in presence of neighbours and monks assembled at Calvasart, point out the land they are conveying. If the indication were anything more than formal, it could hardly be of a fractional part of a villa with all it involved.<sup>2</sup>

Donations received by the Chapter of Thérrouanne in 1157 are thus described: They receive one-quarter of the villa and land of Ellencourt; one-fifth of the allodium of Fofin; one-half of the villa of Leuzens; and half of one-quarter of the same villa; also Popelingehehem, with one-quarter of the villa; also one-quarter of Flori, *tam de terris, quam de nemoribus*.<sup>3</sup>

These are perhaps the last traces of the ancient system; from the end of the eleventh century, it is safe to say that the villa in the ninth century sense has disappeared from the documents in this region.

The donations made in the eleventh, twelfth, and thirteenth centuries to the Abbeys of Samer, Licques, Beaulieu, Andres, St. Bertin, to the Chapters of Notre-Dame of Boulogne, to that of Thérrouanne, are alike in this, that they always comprise parts of many villas or parishes, never the whole territory of a villa or village.<sup>4</sup>

<sup>1</sup> *Chart. Sith.* xxvii, Pars Sec., Lib. i: 'alodium meum hoc est terciam partem tocius ville Ostreseld.'

<sup>2</sup> *Ibid.* xxxiii, Pars Sec., Lib. ii: 'quartam partem videlicet ville tam in agris quam in silvis et aquis et campis.'

<sup>3</sup> These are instances of a well-known problem not yet solved. The following example from the *Cartulaire d'Auchy* seems to present the difficulty in its extreme form: *Cartulaire d'Auchy*, xv. (1123): Medietatem de Virkenken,  $\text{iiii}^{\text{am}}$  partem de Lesi et alterius  $\text{iiii}^{\text{o}}$  partis  $\text{viii}^{\text{am}}$  partem,  $\text{iiii}^{\text{am}}$  partem de Valbercurt,  $\text{iiii}^{\text{am}}$  partem de Nigellis, de Montinis tres partes; iv. In villa Marla  $\text{xi}^{\text{am}}$  partem terrarum; ix. (1112): quartam partem de Lesin; also *Cartulaire de St. Trond*, ix. (1023):  $\frac{1}{2}$  villa Wildesen. Cf. an article by the late F. Seebohm, *Economic Review*, 1891.

<sup>4</sup> See the donation of the Counts of Guines in Duchesne, and practically all the donations in the cartularies of the above abbeys. The Abbey of Licques, for example, had portions of about sixty villages. Cf. *Guiman*.

## II

## THE MANSUS AFTER 900

The Mansus in the Breviatio appeared as a prominent, though by no means universal, unit of tenure. It was described as paying certain contributions in kind, and it was on subordinate mansi that the abbey depended for the week-work by which the cultivation of the *terra dominica* was largely carried out; in the size of the mansi there was considerable uniformity. Further, in this region at least, it appeared to have been used as a unit for the payment of the military contribution of wagons for use in war. We shall now attempt to trace the fortunes of the mansi after the ninth century.

## a. The Evidence.

The tenth and early eleventh centuries offer scant evidence: there are only a few formulae of donation, and even from these little can be inferred. From the middle of the eleventh century onwards we have a long series of recorded transactions in land which are worthy of consideration in connexion with the question of the mansus. For the twelfth century there is the Cartulaire de Guimann, referring chiefly to the villages of St. Vaast of Arras. No evidence of the type of that presented in the Breviatio appears before the last quarter of the thirteenth century, where we have the Terrier of Beaulieu, 1286, and that of Beuvrequen, 1305. It is not until this latter date that we are able to make a fairly complete and detailed comparison between the part played by the mansus in the ninth and thirteenth century villages respectively.

We may note in passing that in the formula of a donation in 938 by the Marquis Arnulfus, the word mansus is not used: <sup>1</sup> it is absent similarly from the formula employed by Victor, bishop of the Morini, in confirming the privileges of St. Bertin in 1057: <sup>2</sup> on the other hand, it reappears as late

Three villages are exchanged for a Berquaria: 'et in singulis villis mansus unus ad ipsam decimam condendam remanserunt.'

<sup>1</sup> *Chart. Sith.* lxxvi, Pars Prima, Lib. i.

<sup>2</sup> *Ibid.*, Pars Sec., Lib. i.

as 1120 in a donation to the Chapter of Théroutanne.<sup>1</sup> In 1056 Baldwin, Count of Flanders, intervening between the Abbot of St. Bertin and the Advocate of Arques, decides that the latter is to receive each year a certain quantity of oats (*dimidiam firtalem avenae*) from each terra of Arques (*de unaquaque terra ipsius ville*).<sup>2</sup> This use of the word *terra*, referring apparently to a fixed amount of land, brings us to the question of the language employed generally in transactions in land after the ninth century in this region.

We have taken from the Grand Cartulaire upwards of one hundred records of dealings in portions of land in the period comprised between 1056 and 1350: more than one-third of these are for the twelfth century. Examination of this list shows that there were no recorded transactions which involved the transfer of *mansi*, and indeed there is nothing here to reveal the existence of such a holding. Secondly, we are struck by what we may term the increasing definiteness of the records as time goes on. It is not uncommon in the twelfth century to find land referred to simply as *quaedam terra*. There are a few such instances in the early years of the thirteenth century, but the last example of such a description belongs to the year 1224. The absence of any precise measures in these cases recalls the general vagueness of description of portions of land which is common in the Carolingian period, and it is not possible to say that these were portions of any definite area, or that they had anything in common with the *mansus*. We have referred above to the expression *unaquaque terra* as used for Arques in 1056; on other occasions we find a description which seems to imply that the *terra* referred to was a distinct unit. At Escalle (the villa Scala of the Breviatio) in 1124, the Count Manasses of Guînes received from *unaquaque terra predictae villae* three shillings and fourpence as the commuted payment of certain tasks to be performed at his castle of Guînes: the land owing such payments is described as being divided into

<sup>1</sup> *C. de Théroutanne* (1120).

<sup>2</sup> *Chart. Sith.* xiv, Pars Sec., Lib. i.

thirty parts.<sup>1</sup> Again, at Wizernes, in 1187, we find mention of the census paid for  $2\frac{1}{2}$  terrae: it amounts to 40s., and is reckoned according to the amounts paid by the other terrae of Wizernes.<sup>2</sup> It appears likely that the terrae mentioned in these three cases have to do with some grouping of the tenures which has taken place since the ninth century.

Thirdly, for the greater part of the twelfth century, and almost the whole of the next, the transactions refer to land of small area: in seventeen cases in the twelfth century in which areas are given the average is about sixteen acres.

Finally, once the third decade of the thirteenth century is passed, the majority of the transactions concern land of which the description shows plainly that it lies dispersed in pieces of various sizes over the arable. But at this, the first moment when dispersion is plainly shown in the documents, there is no uniformity in size of pieces. If these are portions of broken mansi—and some of them at least may safely be assumed to be such portions—they do not enable us to see in what way the original mansi were divided. If the mansi of 850 A.D. were divided in uniform strips, then the process of subdivision had been going on long before the first half of the thirteenth century. We can see in the evidence itself a further *morcellement* of the dispersed pieces in visible process: before 1250 the pieces can be described generally as consisting of a whole number of measures, or if fractions appear they are halves or quarters: in the fourteenth century we find the verge, the one-hundredth part of the square measure, necessary to record the area of the scattered strips. We have drawn illustrations from the Grand Cartulaire simply because we find there a long series of transactions which lends itself to analysis, but the other evidence of the region is to the same effect. We may take as examples the donations made by the House of Guînes to various religious foundations at the end of the eleventh century. They are sufficient to

<sup>1</sup> G. C. i. no. 146.

<sup>2</sup> G. C. i (1187). Cf. *C. de St. Barthélemy*, no. 123 (thirteenth century): 'in quo predicto tenemento sunt 7 mansi vel circiter et 35 manculdate terre vel circiter'; and *Recueil des Actes de Philippe I<sup>er</sup>*, no. 15 (1063): '6 mansa terrae.'

show that the day of the mansus, as a conspicuous element in donations in this region, was over.

**b. The Curtilia of the St. Vaast Villages in the Twelfth Century.**

The earlier history of the great Abbey of St. Vaast, at Arras, resembles that of St. Bertin. The donations made to it in the Carolingian period were often of mansi, and the word is still used in charters of the eleventh and twelfth centuries. The twelfth century Cartulaire of Guimann enumerates the scores of villages from which the abbey's revenue was derived. We shall have occasion to deal with these later, when considering the question of the peasant and the land in this period. Here it will be sufficient to say that the term *mansus* is replaced by *curtile*.<sup>1</sup> For each village the number of curtilia is given, and the distinction is plainly made between the portion of land which is immediately attached to the *curtile*, and that lying *in territoriis*. We are at once reminded of such a description as that of 867, *in loco nuncupato mansum cum casa et inter ipsum mansum et terram arabilem vel pratum bunaria XII et dimidium*.<sup>2</sup> Unfortunately, in the case of the twelfth century St. Vaast villages, the area of land is not given in detail. The land in the *curtile* is simply distinguished from that lying away from it.

**c. Terrier of Beaulieu.**

Next in order of time comes the evidence afforded by the terrier of the Abbey of Beaulieu. This was drawn up in the year 1286, and refers to a number of villages situated in the region between Guînes and Boulogne. The language employed is French, and the mansus appears in the form *més*. The usual description runs thus: *Coline fille Ustasse Mai tient entor XX mesures de terre hors sen més*. The *més* is the part of the holding on which the house is situated. The Beaulieu evidence need not detain us, since exactly similar descriptions are grouped in form more convenient for

<sup>1</sup> Cf. *C. d'Arras*, no. 28, p. 21 (1154-9): 'duos mansos sive curtilia.'

<sup>2</sup> *Chart. Sith.* xliii, Pars Prima, Lib. ii.

examination in the Beuvrequen terrier. We may note, however, that the Abbey of Beaulieu was founded in the first half of the twelfth century, and the tenures here described are the result of donation of parts of many villae or parishes, and serve to illustrate to that extent the breaking up of the domain.

d. The Mansus in Beuvrequen and neighbouring Villages, 1305.

Of 61 tenants of St. Bertin on the territory of Beuvrequen in 1305, 45 are described as holding a mansus. What the mansus was in this place and at this time appears quite clearly. It is that portion of the holding on which the tenant's house is built; it is not the house itself, which is in the terrier always described as *domus*: it is not the mere site of the house: it is the whole of the undivided plot of which the house site forms part. This plot is distinguished as the mansus from the remaining pieces which the tenant may hold. In a few cases *managium* is used as exactly synonymous with *mansus*.

There are ten of those described in the terrier who have the mansus only; the remainder possess a greater or smaller area of land lying, generally dispersed, away from the mansus. With the possession of the mansus is closely connected the liability to a payment called *hostagium*; and the presence of the house is necessary to cause a piece of land to be called *mansus*, and hence to be obliged to pay this rent.

The above description may be verified by quotation from the terrier.

The formula is usually: *Tenens de nobis mansum suum qui continet 11 mensuras*, or *Continet per totum intus et extra 1 et semi mensuram*, &c. The holding of Thomas Cuparius is *tam in manso quam terra arabili*. Johannes de Overrech has 8 journals, *tam in manso suo quam extra*.

'Willelmus de le Riviere filius Thomae de le Riviere tenet mansum suum ab utraque parte vie existentem; in una parte vie manet et inde debet *hostagium*: ab alia parte vie est grangia sua; inde non debet *hostagium*.'

As examples of the distinction between the land lying in the mansus, and the rest of the holding, we may take :

Relicta Laurentii le Vole, who has a mansus containing 9 measures and 5 other scattered pieces.

Petrus filius Laurentii le Vole, who has 10 journals as mansus and also 6 pieces.

Anselmus de Spina has a mansus containing 9 journals, also dispersed pieces, 19 in number : and so on.

The actual size of the mansi of the terrier in the above sense, and the scattered pieces, may be thus summarized :

Of 47 mansi 10 are of 8, 9, 10, 11 measures (roughly, acres).

4	"	"	5, and 6	"
1	is	"	4	"
1	"	"	3	"
12	are	"	2 or more,	but less than 3 measures.
11	"	"	1	"
8	are	less than	1 measure.	

The information furnished by the terrier gives us what may be termed a static view of the state of the mansus. The following entries seem to show the mansus in actual process of change :

' Arnulphus Brassator . . . tenet mansum suum quem cepit ad censam a Johanne le Hieure ; continet  $\frac{1}{2}$  journal et dictus J. le H. tenet managium suum de nobis et debet hostagium et de dicto manso le Hieure idem Johannes fedit alium mansum, scilicet illud semi jornal quod dedit ad censam dicto Ernulfo et dictus Ernulfus tenetur aedificare domum ibidem et debebit nobis hostagium ex illa fissura.

Nichilominus tamen sciendum est quod ante illam fissuram et antequam dictus Ernulfus illud cepisset ad censam erat ibi quaedam domus.'

Also (at Wimille) :

' Symon de Menesdale tenet mansum ; debet hostagium, continet 4 jornales. Item Christianus de Menesdale manet contiguus dicto Symoni—Et mansus in quo manet fissus fuit de consensu nostro. Item Eustachius filius Johannis Wisseman manet etiam contiguus dicto Christiano : Eodem modo mansus suus fissus fuit de manso Symonis.'

Also Laurentius Cardon, who has  $3\frac{1}{2}$  journals : *inde debet*

*hostagium et debet ibi aedificare*, and finally the instructions at the beginning of the terrier read thus :

‘Hic invenies omnes manentes in Boeverkhen et notabis quod eorum mansure esse non possent ociose sed oportet quod edificentur quia quilibet manens in B. debet nobis *hostagium*,’ &c.

Before proceeding to discuss the differences between the mansus of 850 and that of 1305, we may ask the question whether we are really comparing the same holding at two different stages of its history. Unfortunately, Beuvrequen was not one of the villages of the Breviatio of 850: hence our inquiry is in the respect of topography deprived of continuity. The nearest villa of the Breviatio was perhaps Guînes, lying about seven miles from Beuvrequen. For the villages in which the Abbey of Beaulieu possessed lands, we have no earlier records than the terrier we have noticed.

That the villages, which were described in the Breviatio, show no trace of the mansus when evidence becomes plentiful in the fourteenth century, proves nothing under this head, as the same is true of Beuvrequen itself. At the same time it appears safe to assume, reasoning from analogy, that these mansi of 1305 do represent earlier ones of the type shown in the ninth-century documents.

Two very striking changes are at once evident when we proceed to compare these later with the earlier mansi :

- (1) The mansus is no longer a holding uniform in size for the same villa or parish.
- (2) The payments have changed in form : and more especially there is due from these mansi no *corvée*, no week- or day-work of the kind described in the Breviatio, and common in France in the Carolingian age.

We have seen that the mansus of the ninth century was comparatively uniform in area : at the same time uniformity in manner of description may have concealed some of the facts. Already there may have taken place some internal splitting up of the mansus among the family of the holder who was held responsible by the framers of the Breviatio for

the payments of various kinds ; and the removal of the binding force which caused the mansus to remain to all outward appearances an unbroken unit, would serve to show that in reality it was becoming dismembered. It is easy to say that the agent of this removal was the disturbance accompanying the period of invasion and general unrest which followed on the mid-ninth century. However, in employing a proposition based merely on the probable effect of this period, we only seek to hide our ignorance of the exact nature and mode of action of the dissolving force. It is clear, at all events, that a generation or two of equal division among children, if coinciding with a time when no new outlet for population was offered, would suffice to give us a mansus of the kind we see in the thirteenth century, and such a combination of circumstances was a likely one in the tenth century. This conclusion would not prevent our recognition of the fact that new mansi or holdings of the same kind, as for example, the *curtilia* of southern Artois, might be created in a revival of agricultural activity after the period of invasion.<sup>1</sup>

#### a. Corvées after 900.

But we are obliged to ask how far this breaking down of the mansus is connected with the disappearance of the system of cultivation of the *terra dominica* by the tenants of the dependent mansi. We may conveniently deal here with the general question of payment by corvée or task in the period following on the tenth century.

Starting from the terrier of Beuvrequen of 1305, we find but one mention of a corvée ; in that complete list of all that St. Bertin received from the tenants of a group of villages three journals of land, we learn, are sublet for 8s., a goose, and two days' corvée. It is with this in mind, then, that we must read the list of rights possessed by the Abbey at Beuvrequen in 1253, which includes corvées.

<sup>1</sup> For instances of such distribution of land in mansi, see *C. de St. Trond*, cxxiii (1210), where land is portioned out into 'mansiones hereditarias' with obligation to build in the case of two ; also *Liber Hermani*, *Mon. Germ. Scriptores*, xiv. 72.

The enumeration of rights enjoyed by the Abbey of Beaulieu in its villages includes similarly 'Corowées', but the thirteenth-century terrier shows that here they included only the carrying out of such occasional tasks as the carting of hay. This is the service which appears oftenest in the evidence for the period. The tenant of Beaulieu, who *doit tenir le voie en point à carier les Karettes de Beauheu a Moulin de Hardingeshem*, is called upon for a task which resembles the modern 'prestation', and has nothing in common with the week-work of the ninth century. The Cartulaire of Guimann shows the payment from tenants of 120 villages: in only ten of these are corvées exacted. In six of them the total task is three days per annum. At Bigartio the three days include two spent in clearing from weeds the wheat and oats respectively, and a third occupied in spreading manure or marl on the land. The most extensive corvée mentioned for these villages is one of six days per annum.

There is an isolated reference, of date 1000 A.D., to the exaction of task-work, which consisted in the performance of a few days' work per year. Further back than this date we are entirely without evidence until we reach the documents of the ninth century.<sup>1</sup>

The systematic cultivation of the seigneurial reserve by the tenants of the domain no longer existed, then, in the region of Beuvrequen in the thirteenth century, or in the villages of St. Vaast in the twelfth. In the interval between the date

<sup>1</sup> *C. d'Auchy*, under date 1000: 'De unoquoque orto operam dierum duodecim ad castrum Hesdini in Martio . . . de dimidio horto vi dierum operam, de coteriis 3 dierum operam': 'in unoquoque anno debet habere comes ter corouverias ad gascheras, ad remotiones, ad advenas.'

*C. de St. Trond*, liii (1146): 3 days' service in August, '3 ad seminandum in autumnno et similiter in marcio.' If the hospites help in repair of house, barn, &c., they receive their food.

*C. de Chocques*, v (1131-69): 'et opus ad fenum.'

*St. Hubert*, ccxc (1258), where *charrois* are renounced.

*C. de N.-D. de Boulogne*, xcvi: 'Couruées à nos fains de cheus que les nous doivent.'

See *Chronique des Comtes de Hainault*, DCCLXXXIV (1395): 'État des corvées faites pour le service du comte de Hainaut dans les maisons et cours de l'abbaye de Hautmont 1394-95 . . . les coruées qui s'ensuivent . . . somme de ces coruées de 1 kar à 4 chevaux et 2 variés vi<sup>xx</sup> iiii jours.'

of the Breviatio and the twelfth century it disappeared: it was probably non-existent in the eleventh century in this region. We cannot be more precise than this.<sup>1</sup>

Our difficulties are increased by certain peculiar features of the French evidence for the Carolingian period. That evidence furnishes a surprisingly small amount of information as to the way in which the cultivation of the demesne was arranged. We are told nothing of the plough-teams and how they were contributed; nor, indeed, do we see clearly that they were contributed by the tenants at all. The plough and all connected with it is conspicuously absent from the evidence both in the earlier and later Middle Ages. Hence we are cut off from a knowledge of the working of the system in 850, which might enable us to find some inherent characteristics preparatory to this, to all appearances, rapid change—a change sufficiently profound to justify considerable hesitation in accepting the description ‘manorial’, as applied to any system of agricultural exploitation practised in this region after the tenth century. We shall be obliged to return to this aspect of the transformation of the mansus. It is hardly possible to disconnect it from the virtual disappearance of the system of week-work, and of ploughing of the terra dominica by the tenants of mansi.

<sup>1</sup> The reference to week-work in Duchesne (extract from *Chronique d'Andre*, A.D. 1210) is the only one we have found in this period and region. It runs: ‘unum operarium ter in hebdomade per totum annum dum licebat operari.’

## CHAPTER III

### THE ECONOMIC SETTING

THE evidence for these centuries shows what is at first sight a bewildering maze of conditions on which the peasant may hold the land from which he gains his subsistence. The payments due from holdings other than the *mansi* attached to the *demesne* presented in the ninth century little uniformity, and the intervening centuries have brought still greater diversity. There is not only apparent, but real confusion. We see the *débris* of older systems now modified or disappearing, and the results of the action of new tendencies which increase in force as we approach the end of the thirteenth century.

Our concern in this essay is rather to obtain as close a view as possible of the peasant as he was, than to classify the payments due from him to the various authorities which controlled the society in which he lived. Hence we propose to proceed, as it were, by gradually narrowing the circle; to examine first those payments which are most general in character and may be held to touch the bulk of the peasants of this region, and thence gradually to arrive at what we may consider the essential and central payments, those attached most immediately to the piece or pieces of ground that the individual tenant tills. We neglect, thus, several possible and more usual classifications. From the point of view of origin we might attempt to separate carefully *domanial* from *feudal* payments, or we might attempt a classification which would show which payments are in the nature of fees, which are rather taxes, and so on.

On this principle, the general mass of payments may be divided thus:

- I. Tithe and Church dues.
- II. Payments arising from general monopoly of trade.
- III. The *Banalités*.

## IV. Corvées.

V. Numerous payments, domanial in character, which include those made for right of grazing, relevatio, &c.

VI. Payments attached to the land itself. They include—

(a) Customary payments.

(b) Methods by which part of the produce returns to the owner, as Terrage, Métayage, &c.

(c) Payments arising from contract—rents, leases, &c.

VII. Certain personal payments connected with status.

Without following this classification in detail, let us consider some of the chief kinds of payments.

## I. THE TITHE

Proceeding to a brief examination of the chief of these payments, we may conveniently deal first with the most universal and most clearly defined tax to which the landholder was subject—the tithe.

The tithe is universal in its incidence; in theory ecclesiastical, it is in this age frequently in the possession of laymen. Tithes pass from hand to hand by way of gift, exchange, sale, or pledge, with the result that the whole territory of a village seldom pays tithe to the same authority. The disintegration of the villa is shown very fully here, but in course of time a tendency towards reintegration asserted itself; the tithe became increasingly concentrated in the hands of the Church, and, to judge from the documents of the eighteenth century,<sup>1</sup> whole villages often paid tithe to the same Abbey or Chapter.

*Morcellement* of the tithe is widespread in this period; transactions in minute fractions of the tithe on a given area are common. We have the tithe thus subdivided to the extent that  $\frac{1}{9}$ ,  $\frac{1}{13}$ , and so on, are common figures. An instance for Quelmes, in 1282, is typical: it concerns the tithe paid by 13 measures of land at Loningahem, and these 13 measures lie in three pieces, in three different parts of the village arable.<sup>2</sup> The tithes, apart from the cost, were vexatious in the manner

<sup>1</sup> e.g. *The Atlas des Dîmes du Chapitre de St. Omer*.

<sup>2</sup> Cf. *C. de N.-D. de Boul.*, xxxv. 1208: ' $\frac{1}{3}$  of  $\frac{2}{3}$  of tithe'; *C. de Samer*, xv. 1224; *C. de St. Lambert de Liège*, DCXCIX (1277); *G. C.* ii. no. 397, an. 1258: sale of 'dimidium cumulum decime'.

of their collection; the crops must not be removed from the ground until the Church has taken its toll, even in threatening weather.<sup>1</sup> The machinery for tithe collection must have been one of the most familiar and characteristic features of the time. A tithe barn was erected by St. Bertin within the area of such villages as paid sufficient tithe to the Abbey to justify the outlay.<sup>2</sup> The tithe journey, too, was a regular part of monastic administration; the scores of parishes from which the monastery might draw tithes were visited in turn.<sup>3</sup>

Probably in the collection of no part of their revenue did the monks meet with such opposition as in the case of tithes. The lay seigneur of a remote village was often reluctant to see part of the produce of the territory under his control withdrawn by the Church. We find an illustration of this in the promise made by one Boidin to the Chapter of St. Omer in 1241.<sup>4</sup> He engages himself not to hinder the collection of tithe in the parish of Brokerke; he will not in future forbid his men to buy the produce of the tithe, or to hire their labour or their carts to the collector sent by the Chapter, nor will cause ditches to be dug or put obstacles in the way of the free circulation of the carts engaged in collecting tithe. Disputes concerning tithes crop up on almost every page of the evidence.<sup>5</sup> It was in the collection of the herring tithe,

<sup>1</sup> G. C. v. 103.

<sup>2</sup> G. C. iii. 224, an. 1268.

<sup>3</sup> For methods of collection, &c., see *C. du Chapitre d'Arras*, no. 73, where the Mayor of Fresnicourt receives 12 menc. of corn for taking tithes from 2 villages to barn; *Chronique d'Andre* for 'tournée annuelle', G. C. i. no. 362, an. 1192: 'Si monachus de P. vocet R. in collectione decimarum ipse veniet ad eius auxilium cum 3 equis vel cum pluribus si cum pluribus vocatus sit et singulis equis dabuntur duo manipuli avene ad pabulum,' etc. Also *C. de St. L. de Liège*, cxv (1250); and many liasses in *Archives of Chapter of St. Omer* for receipts, &c., e.g. G. 2561, G. 2516.

<sup>4</sup> *Arch. Chap. St. O.*, G. liasse 2580.

<sup>5</sup> e.g. G. C. ii. 155 (1220); and cf. *C. de St. Trond*, lxiv, an. 1154: 'decimam quam parochiani debebant per domos singulorum colligebant. Alii reverenter ut decebat, de benedictione percepta gratanter decimabant, alii retrahendo et contradicendo vix aliquid dabant.'

In later times disputes were frequent over the right to enclose and avoid the tithe; see G. C. vii. no. 113, an. 1455, and no. 125; also G. C. an. 1463, for Royal letter forbidding enclosure: 'les aucunes terres qui de tout temps ont este arrables et à usage de labour depuis 18 ou 20 ans les ont ou partie d'icelles enclos . . . de hayes et clottures en les mettant à d'autre usages que de labour.'

however, that the religious houses of the neighbourhood encountered the most serious opposition. The herring fishery had become important towards the end of the twelfth century; more particularly was this so at Calais, Peternesse, Broburg, Loon, and Gravelines. As early as 1172 it is recorded that Matthew, Count of Boulogne, gives to the Abbey of St. Josse 10,000 herrings yearly, to be paid at Boulogne or Calais.<sup>1</sup>

At a Council held in 1179 the Abbot of St. Bertin obtained from Pope Alexander III letters to the Count of Flanders asking him to enforce the payment of the herring tithe. The Count assembled the fishers of the town concerned, and, acting on behalf of his niece Ida, those of Boulogne as well. The fishermen denied the existence of such a tithe, and said they preferred to die rather than pay it. Further attempts on the part of the Monastery led to the dispatch of two monks with letters from the Count to the inhabitants of Calais; the messengers had difficulty in escaping with their lives. The town of Calais was fined £1,000 and the tithe was definitely fixed at one-third for St. Bertin, one-third for the upkeep of the church, and one-third for the poor.

Apparently, however, all difficulties had not been removed, for in 1180 the Abbey describes more exactly how the tithe is to be paid. All boats, having their head-quarters in parishes belonging to St. Bertin, should pay over during the season one-third of the share of one member of the crew. In return, masses were to be said for those at sea or for the souls of those who perished. Again, in 1184 there were further refusals, and it proved difficult to check the correctness of the share attributed to one man. In 1192 the captain, with two of the crew, was to swear that they had dealt honestly.<sup>2</sup>

The murder of the two monks who were sent to Nieuport by Notre-Dame de Boulogne, in 1236, to collect the fish tithe, shows that difficulties continued to arise.

<sup>1</sup> *C. de Licques*, lxxvi, an. 1261, and xxviii; *C. de St. Nicolas de Furnes*, an. 1233, 1247, 1305; *C. de Beaulieu*, x (1185); *G. C.* ii. no. 140; *C. de N.-D. de Boulogne*, xxvi, xxx.

<sup>2</sup> *G. C.* i. no. 367, &c.

These seafarers were neither so amenable to persuasion nor so easy to punish as the dwellers in inland parishes.<sup>1</sup>

## II. THE VILLAGE CHURCH

The church established on the domain must still be considered, in the second half of the Middle Ages, as an object to which a certain amount of the revenue of the peasant was diverted. The cost of the upkeep of the fabric fell upon him. The right of erecting new churches was granted sparingly by the abbey, as it meant the transfer to the curate of a certain amount of revenue which had previously gone to the abbey direct.

At Acquin, in 1186, a new chapel was erected (there appears to be no trace of the church mentioned in the Breviatio). For the priest's salary 40 measures of land are set aside, or, if he so prefers, 100 shillings; any future increase must come from the village. Part of the revenue of the church consists of fees paid for burials, baptisms, 'sponsales', the reconciliation of relations, confessions, anniversaries, and 'tricenarii'. Offerings of vestments, silk, wax, and candles are mentioned as coming to the priest on the occasion of a funeral in 1300. Part of the tithe is, of course, often assigned to the priest.<sup>2</sup>

Generally speaking, the privilege of erecting a church within a given area was as jealously guarded by the abbey as that other great monopoly of the mill.<sup>3</sup>

## III. THE MONOPOLY OF TRADE

We are accustomed to include, among the evils from which France suffered on the eve of the Revolution, the fact that there was no freedom of trade from province to province, so that scarcity in one region might be co-existent with plenty

<sup>1</sup> Similar difficulties are recorded in *C. de St. Winoc*, p. 147 (1183): 'Quodsi in ore ejus inventum fuerit mendacium et perjurii reus esse convinci poterit ipse cum omnibus rebus suis in manu erit comitis.' See also *G. C.* iv<sup>b</sup>. no. 234, and vii. no. 49 (1450).

<sup>2</sup> Cf. *C. de Ste. Aldegonde*, ix (1298), *G. C.* vi. no. 155 (1418), *C. de Guiman*, pp. 161 and 290.

<sup>3</sup> See *C. de Guiman*, p. 321, where mills and church are coupled in a prohibition.

in another. In the Middle Ages each region represented in miniature the France of the eighteenth century.

The general tax on merchandise, levied in the Frankish period under the name of *theloneum*, had passed from royal to private control, largely through the agency of the grants of immunity. In the centuries from the ninth to the fourteenth the *theloneum* continues to exist, perpetuated by the feudal system and by the theory of the complete monopoly exercised over the domain by the dominus or seigneur. The latter demands his share of the proceeds of all commercial transactions—often not in the form of a percentage of the profits but as a certain proportion of the value of the transaction, from both buyer and seller. Merchandise must pay for the privilege of passing through the domain, and often the mere passage by wheeled vehicle becomes a source of revenue. In this age the terms *Theloneum* and *Tonlieu* are loosely applied to all taxes on merchandise, but the distinction is usual between *pedagium* or *plage*, levied as a kind of customs duty on the passage of goods, and the *tonlieu*, which is collected in the place where the goods are exposed for sale.

It might appear that these payments affect rather the merchants and the inhabitants of urban centres than the peasants, but the *tonlieu* is levied on the humblest transactions carried out in the villages, and is always included in the list of domanial rights. Further, the *tonlieu* is levied, in the market at Arras, Boulogne, or St. Omer, on the produce which the farmer brings in for sale. The common standard for the quality of corn is that of the best 'entering St. Omer by the gate of Boulogne'.

Under *tonlieu* are included a variety of taxes levied on special articles. The most important of these is the 'forage', or tax on dealings in wine. Thus we find recorded, in 1330, a dispute concerning the *forage d'un tonnel de vin vendu à brocque*; that is the share due, in this instance, to the Abbey of Licques, of the proceeds of the sale of a barrel of wine, retail (by the jug).<sup>1</sup>

<sup>1</sup> G. C. viii. nos. 121, 122; iii. no. 44; and C. de Ste. Aldegonde, no. 27 (1308).

The tonlieu of the great Abbey of St. Vedast, at Arras, of which two tariffs are preserved in the Cartulaire de Guimann, may be taken as typical. Guimann began his record in 1170, and it was terminated by his death in 1192. The two lists of charges which he preserves are dated 1024 and 1036 respectively, but we may suppose them to have been current in his own day.

Theloneum is to be paid by all those living outside certain limits. The inhabitants of Arras pay, if they are not men of St. Vedast. Proof of origin may be demanded by the thelonarius, in case of dispute. On transactions begun elsewhere, and completed in the city, the dues must be paid. The priest who trades owes theloneum, except for the horse he buys for his own use, and for his own food and clothing. One curious exception to the freedom from tax possessed by the men of St. Vedast occurs: Whoever buys or sells gold, a slave, or a goat, must pay. The long list of goods with charges reveals a market which must have borne a strong resemblance to a modern French provincial market. Generally speaking, on the large transactions  $\frac{1}{60}$  of the value is exacted; thus, one pound pays 4*d.*; five shillings, 1*d.*; and so on. The list of goods includes fish of various kinds, corn, fruit, skins, honey, bacon, oil, iron, yielding sums from one halfpenny to fourpence. Salt and wine are separately treated. A load of salt pays 4*d.* as theloneum, and 2*d.* for sexteragium. Certain weights of wool, oil, English cheese, and Flemish cheese, pay both theloneum and tonagium. The payments due from those who sell stock vary from one halfpenny for a goat, ass, sheep, pig, to twopence for a horse. The sums due periodically from the stalls in the market are included as theloneum. In this eleventh-century list some payments are required in kind and others in money. The smith's stall owes 4*d.* per year; the vendors of spears and sickles give a spear and a sickle respectively. The stall of the rich 'mercyer' owes 4*d.* per year; that of his poorer neighbour one egg per week; that of the shoemaker one penny per month.

The market is free to all, without exception, who are willing

to pay the dues. All measures and weights are in the custody of the thelonarius or cellerarius of St. Vedast.

In the later centuries of the Middle Ages, the theloneum changes in character, and resembles the modern *octroi*. It is paid at the entrance to the territory where the goods are to be sold. The payment for *étalage*, or for displaying goods for sale in the market, becomes a payment of the nature of modern market-dues.

This payment is illustrated by the list of charges levied as theloneum by St. Bertin in 1402.<sup>1</sup> The goods are taxed at entrance to the Abbey jurisdiction, without regard to any transactions which may be carried out. Apparently the assumption is that a large proportion of the articles will arrive by water. The list is long, occupying seven pages of the Grand Cartulaire. Under fish, come twelve items paying from 1*d.* to 4*d.*; meats, skins, &c., are covered by sixteen items; cheese, butter, wax, &c., by fifteen. Wool is subject to varying payments according as it is carried by cart, pack-horse, or on the merchant's back.

Boats arrive with corn, salt, coal, oil. The dues on honey are less if not destined for sale in St. Omer. An Englishman coming to sell pays 4*d.*, and similarly if he wishes to buy and convey produce to England. If he comes for religious purposes he enters free; nor is an English clerk required to pay for himself or servant.

The whole document shows a busy commerce carried on at St. Omer, at the end of the fourteenth century; and shows, too, how far the commercial monopoly of a great abbey might extend with the growth in trade and population of the region under its sway. The right of St. Bertin for tonlieu extended to Théroutanne, thirteen miles by road from St. Omer.

*Pedagium*, as we have said, was levied as a return for the privilege of passage with goods, as is indicated by its alterna-

<sup>1</sup> G. C. v. no. 383, pp. 708-14 (1402): 'Hæc sunt consuetudines et jura quæ habet ecclesia S. B. in Theloneo de Castra S. Audomari et in appenditiis ejus.'

<sup>2</sup> Other tariffs may be consulted in Giry, *Hist. St. O.*, 'Pièces justif.'; and the Tariff for *Bapaume* in *Bull. Soc. Ant. Mor.*, livraison 172.

tive title of *traversum*. There were important péages at Gravelines, Wissant, Étaples, and Nieuport. It was on the péage of this last town that King John of France gave £60 to Notre-Dame de Boulogne on his return from England in 1360;<sup>1</sup> and four years later the whole revenue was given to the Chapter. The péage was not levied, however, only at seaports, but, more particularly as *traversum*, it was demanded at various inland villages of this region. Often it appears confused with the payment for the right of passage of vehicles, a tax more in the nature of the modern toll. The people of St. Trond were given authority in 1352 to collect for twenty years a tax (*pedagium*) on carts going through the town; it was to be applied to the upkeep of roads.<sup>2</sup>

We find the Abbey of St. Vaast quit of all payment for *traversum* in the town of Bapaume, on annual payment to the *custos* of a pair of shoes 'de scarlata', worth 5s.<sup>3</sup> The control of the roads running through the domain is closely connected with the commercial monopoly. We are to imagine the travelling merchant in these times often arriving at a domain through which there is no 'right of way', at least for his vehicle or pack-horse. The public road does not yet exist. We meet in the St. Omer region a tax known as 'cauchie', which was demanded as compensation for the use of roads. The monks at Clairmarais found it necessary to pass frequently through the village of Arques,<sup>4</sup> one of the St. Bertin domains; the Abbey demands 'cauchie' for the carts large and small, horses, and men, passing through the village. The claim is surrendered on condition of those of Clairmarais carrying only their own goods, and not, fraudulently, those of others. Further, they are required to keep in good repair a certain road which they use; they may take earth, gravel, and other material from the land of St. Bertin.<sup>5</sup>

<sup>1</sup> *C. de N.-D. de Boulogne*, cxxi.

<sup>2</sup> *C. de St. Trond*, lli (1146), cccxcii; and see *G. C.*, no. 339 *bis* (1187), for 'vectigal navigantium.'

<sup>3</sup> *Guiman*, p. 279: cf. also p. 208.

<sup>4</sup> 'Cars, karettas, chevaux, jumens, ou quelconques harnas passans parmi le ville et comte d'Arques': *G. C.* 1392.

<sup>5</sup> See also *G. C.* v. no. 433 (1406), for 'Ruage et Cauchie' at Arques; and for ferries *G. C.* v. no. 264 (1393), and vi. no. 236.

We have chosen a few illustrative facts, from a considerable quantity of evidence which remains, for the theloneum.<sup>1</sup> Fully to appreciate the extent to which commerce and communication were hampered, we must remember that in a comparatively small area around St. Omer, the Abbeys of Beaulieu, Licques, Samer, Clairmarais, Andres; the Chapters of Théroutanne and Boulogne; the Counts of Guînes, Boulogne, and Flanders, possessed similar rights.<sup>2</sup> Further, as under the earlier monarchy the public powers were divided and became private possessions, so here grants of exemption served to complicate what was already sufficiently involved. The great feudal nobles free the religious foundations from the payment of tonlieu, &c., throughout the territory they control. Thus, in 1150, the Count of Guînes promises that the monks of St. Bertin shall be exempt from traversum on their passage to England; in 1190, Philip of Flanders declares that they need pay no theloneum, pedagium, or traversum throughout his dominions; the exemption applies only, however, to articles which are for the personal use of the brethren. In 1192 they are excused payment of tonlieu at Wissant; and in 1194 of the same tax at Gravelines.<sup>3</sup> It would be easy to multiply such instances; the exemptions are granted to numerous abbeys, from Liège to Boulogne, and in much the same terms. Sometimes they are confirmed by papal indulgences. Their net result is to free the members of the religious houses from restraint in travel and in conveyance of produce destined for their own consumption.

<sup>1</sup> See the various 'coustumes'. In the *Coustume de Guynnes*, p. 72, we read: 'on commande que chascun qui a vendu ou achapté aucune chose dont il doit tonlieu qu'il crye hault et bien appert tolnare tolnare sur le paine de lx sols d'admende.'

<sup>2</sup> They were of course often farmed and subdivided; cf. *G. C.* iii. no. 77 (1249): 'feodum quod tenebat a dicta ecclesia ad vitam suam videlicet partem thelonei de Blendeke et de Billeke.'

<sup>3</sup> *G. C.* i. no. 352: 'liberam quitamque dimisi per totam terram meam ab omni exactione et consuetudine Theloneii pedagii et traversi ex hiis dumtaxat que ad usum fratrum ibidem Deo servitium pertinere noscuntur.' *G. C.* i. no. 366, no. 382; viii. no. 194; viii. no. 61 (for batelier of St. B. in Flanders); no. 30 at Bruges and Darn. Also *C. de N.-D. de Boul.*, no. iv: *C. de Samer*, ii and v: *C. de St. Trond*, xlii and lxxv: *C. d'Orval*, xv: *C. de Licques*, xxviii: *Beaulieu*, xvi (pedagia, wignagia, seu roagia); and *St. Winoc* 1197. *Registre Arch. Chap. St. Omer*, under 1189, 1195, 1224, 1241, &c.

Both the rights of tonlieu, &c., and the exemptions from them were naturally fruitful sources of dispute; often the dispute turns on the question as to whether the load of wood, salt, herrings, &c., is for the personal use of the monks or not.<sup>1</sup>

What we have said of the collection of tonlieu at Arras illustrates the advantage to the seigneurial monopolist of the existence of a well-attended market on his domain. The tonlieu itself was the chief source of revenue, but there was also that derived from the hire of stalls, and from the monopoly of the weights and measures. At Poperinghem, for example, St. Bertin possessed income from the 'poids public', and from the 'louage des étaux', which were used to display cloths at the Wednesday market each week.<sup>2</sup> The fines derived from the right of settling disputes concerning weights and measures must also be included in the benefits derived from the control of a market. The right of establishing fairs, which had been a regality in the time of Charlemagne, does not appear to have shared in the general *morcellement* which overtook most of the royal rights in the feudal period. It is exercised only by authority of the more important feudatories. The right of exacting the tonlieu fell to the lord of the domain; in 1368 the town of St. Omer bought the right from St. Bertin for the duration of the fair of St. Michael, lasting nine days from September 29.

But the keenness with which the claim to right of jurisdiction over fairs was asserted was largely due to the fact that the policing of the fair was an important source of profit. In the early years of the fourteenth century a protracted dispute took place between the Abbey of Samer and the Count of Boulogne, both parties claiming the 'garde' of the 'feast or fair' of Samer.

<sup>1</sup> See *C. de Samer* (1320): 'Articles de l'abbé et couvent de S. contre le comte de Boulogne.' Among the grievances of the Religious are that péage had been taken from monks at Wissant; a denier from men 'amenant sel pour la pourveance de la dicte église,' 2 deniers from others 'amenant herens,' &c.

<sup>2</sup> *G. C.* iii. no. 250 (1269).

The abbot asserts that his officers alone have the right to seize those found armed at the fair; and that the monks are entitled to punish all offenders, and to receive all 'espoils et emolumens qui y eschient'.

The general impression we receive from the study of the records, which illustrate the working of the commercial monopoly by the seigneur, is that of a system which is vexatious rather than oppressive. As in the case of the tithe, the inquisitorial interference of the collector is the chief grievance. The payments are not large in amount, and, when fixed by custom, must, with the decrease in the value of money, have become comparatively insignificant. The hindrance to commerce and free intercourse, which these same rights represented, must have been very considerable.

#### IV. THE BANALITÉS

##### a. The Mill.

What was to be called in the *Cahiers* of the Third Estate of Artois, in 1789, 'the odious banalité of the mill', was in full force in these centuries. Residence within a certain area entailed attendance at a certain mill, not necessarily, however, situated within that area. The changed character of the villa is shown by the fact that, in very many cases, the possessor of the bulk of the rights over a domain is not the owner of the mill. At the same time, the great abbeys, and especially those early established, as St. Bertin and St. Vaast, are the owners of scores of mills, whose value is enhanced by the existence of the banalité.

In the ninth and earlier centuries the right of erecting mills was rigorously monopolized. The same policy was pursued in the later Middle Ages.<sup>1</sup> There are not lacking instances

<sup>1</sup> Cf. *G. C.* iv<sup>b</sup>. no. 197 (1347): 'd'avoir seuls et pour le tout molins en l'eawe et ryvière qui va d'Arques à St. O., à Bourbourg et Gravelines. Sanz ce que aucuns autres puisse ou doie faire ne avoir molins en la dite eawe et ryvière d'Arques jusques à Bourbourg et a Lodick et les proufiz et emolumens de blés qui moluz y sont et d'avoir le cours de la dite ryvière sanz aucun empechement.'

of the destruction, or confiscation,<sup>1</sup> of mills erected in defiance of monopoly.

At the end of the eleventh century, the people of Watten had begun to build a mill between the old monastery of St. Bertin and their villages. The Abbot Lambert was successful in causing the cessation of the work.<sup>2</sup>

The compulsion involved in this banalité is clearly illustrated in many quarters. The men of Quelmes are required to grind at Esquerdes; if any inhabitant of Quelmes be reported to have sent corn to be ground elsewhere, the provost may confiscate the sack and flour, dough, or bread.<sup>3</sup>

The Abbey of St. Bertin claims this banalité in three parishes of St. Omer, and may send an officer, the Prouvre (*qui in flamingo ydionate vocatur Prouvre*), to examine loads of corn or flour; if he arrests flour ground elsewhere, he receives 60s., or the horse or vehicle, the Abbey receiving the flour, and the 'custos' the bag. At Arras, early in the eleventh century, the officer of the cellerarius may turn aside corn on its way to another mill, and bring it to Mellenz; if he finds the corn returning ground, he may bring both ass and flour to the cellerarius.<sup>4</sup>

Of the extent to which this banalité was oppressive we have little means of judging. The miller may farm the mill from the abbey or seigneur; at Wizernes, in the twelfth century, he holds

<sup>1</sup> G. C. i. 363 (1192): iv. nos. 197, 208, 209, 211: ii. 23 (1202), 55 (1207), iii. 170: iv<sup>b</sup>. no. 14 (Seizure of mill on Aa by Royal Order): vi. 350. *C. de St. Trond*, cccxxx.

<sup>2</sup> *Chart. Sith.* Pars Sec., Lib. II. lxxxii.

<sup>3</sup> G. C. vii. 250 (1464): 'Esquerde: auquel molin toux ceulx de la ville et paroisse de Quelmes sont tenus de aler maure par ban, et s'il advenoit que de leur voulente non raisonnable aucun d'iceulx de la dite paroisse aloissent ou envoiaissent maure ailleurs que audit molin que le dit Anthoine les pouvoit poursyeoir ou faire poursyeoir... en la dicte ville de Q. ou ailleurs et seroit le sacq, farine paste ou pain confisquiez en son droit.'

G. C. iii. 284 (1275): 'estoient tenu de maurre leur mouture a men moulin et de faire quire leur pain à men four et d'acater laigne et bos à ardoir pour l'usage de le dite court a mes bos et sour ce ausi... il ne deuscent ne pensent leurs bles et leurs tremois à Henchin faire carrier ne mener hors des cams devant soleil, etc.'

<sup>4</sup> The *C. de Guiman* gives many interesting details for the administration of the Mills of St. Vaast.

the office through his wife, who inherits it.<sup>1</sup> He takes as his pay a certain proportion of the flour resulting from the grinding. This is the 'moltura', which figures largely in the documents of the period. The proportion thus paid does not often appear, but it was fixed by very long custom.<sup>2</sup> For the mills belonging to St. Vaast, which lay between Anzen and Athies, the cellerarius was allowed to increase or decrease the 'moltura' according to the supply of water available for the mill.<sup>3</sup>

The real grievances attached to the exercise of this banalité were not usually, we imagine, connected with the fact that the 'moltura' was excessive. But attendance at a particular mill often meant a serious waste of time, and this in two ways: the mill might be situated at a considerable distance; when the farmer arrived with his load of corn, it would be to find a string of loads all to be ground before his own. It was for these reasons that the banalité was frequently evaded, and they are reasons that would affect more particularly the dwellers in the growing towns of this region. At Étaples, in 1277, William XI, Count of Boulogne, allows a certain choice to the people of that town. They may take their corn to be ground elsewhere if they wish, but in that case must pay the 'moltura' to his mill. The miller swears to do his work 'well and honestly', and 'without delay'. The last two words had their significance to the men of Étaples in 1277.<sup>4</sup>

St. Vaast possessed four mills at Mellenz, now a part of Arras. All the bakers of Arras were by custom required to grind there and have precedence. After disputes, Baldwin of Flanders confirmed the custom in 1115. But the writer of the Cartulaire adds that, the number of bakers having grown, they have been allowed to grind at other mills of the Abbey.

<sup>1</sup> G. C. i. no. 386.

<sup>2</sup> Cf. G. C. vii. no. 250 (1464): 'Sauf que ceulx de la dite maison ne doivent payer ad cause de mouture que le vingt quatrième et les autres doivent payer au seizieme.'

<sup>3</sup> 'molturas etiam secundum incrementum vel decrementum aquarum cellararius alleviare vel aggravare potest': *C. de Guiman*.

<sup>4</sup> Cf. G. C. ii. no. 373: 'et quod possit molere in predicto molendino proximus post illum quem molentem invenerit excepto blado bolengario-rum.' Also G. C. iv<sup>b</sup>. no. 61.

Hence, it is plainly the situation of the mills, and their inadequacy, which furnish the grievance.<sup>1</sup>

It is interesting to note, in this connexion, that when dispute arises, the terms of settlement include a statement of the exact amount that has to be ground at a certain mill. Thus, in 1130, the Abbey of St. Bertin is required to grind at the mill of Esquerdes to the extent of 24 measures annually, with precedence over everybody else except the person actually using the mill at the time. The vindication of a claim is less valuable than the determination of an amount.<sup>2</sup>

#### b. The Right of Fishing.

Closely connected with the monopoly of the mill is that of the water by which the mill is driven. From very early times the water-courses had been included in the domain; and the sole right of taking fish was strictly reserved to the proprietor, or else granted on certain conditions. In a region which contained so much marsh and water as that between Arras and the sea, the monopoly was often evaded. We find frequent mention of the confiscation of a net and engines; of the prohibition of such engines; of the removal of obstacles placed across a river. The bourgeois of St. Omer were frequent offenders. Severe punishments, which included, at St. Trond, excommunication, were probably of little avail in face of the facilities for poaching. Arrangements were common between neighbouring proprietors, as to the height of sluice-gates and the custody of the keys, the right of flooding meadows, the use of boats, the keeping of swans, &c. In a dispute at Monchy les Neuville, in 1255, we find a distinction made between the rights of day and night fishing.<sup>3</sup>

<sup>1</sup> *Guiman*, 247, 355, 321, 331-4, &c. For other details of this banalité vide *C. de St. Trond*, liv. cccxxviii, cli; *Chroniques des Comtes de Hainault*, ccccliii: *C. d'Orval*, cccxcvi.

<sup>2</sup> Cf. *G. C.* ii. no. 114: 'condemnavimus ad hoc ut ad molendina prefatae ecclesiae molere teneantur Michaellem de Furno in 24 razeriis bladi ad mensuram S. A., Willelmum de Furno in totidem,' etc.

<sup>3</sup> Cf. *G. C.* ii. no. 79, A.D. 1210 for dispute with Clairmarais: 'apparatus fecerunt qui vulgo verra dicuntur in terra illa ita dispositos quod pisces intrare possint fossatum illud sed exire non possint.' Also *G. C.* viii. no. 46; ii. no. 239; iv<sup>b</sup>. no. 255; iii. no. 308 (for weiras); ii. no. 245, iv<sup>b</sup>. no. 141; viii. no. 46: *C. de St. Tr.* clxxxix, cxc, and lii

## c. The Oven.

The banalité of the furnum is universal in the twelfth and thirteenth centuries in this region, but plays by no means so large a part in the evidence for the time as the tithes, the fisheries, or the mills.

There is no apparent sign of the existence of this monopoly before the eleventh century,<sup>1</sup> and it disappeared long before the more important one of the mill. Apparently, all bread is to be baked at the lord's oven. We are inclined to think that there must have been local regulations as to the baking of a minimum amount of bread per week. We know of no evidence as to attempts at evasion of this banalité, and the amount paid to the *fournier* was not large. The seigneur of Heuchin required the inhabitants to bake their bread at his oven, and, further, to buy the wood for the furnace from his woods. So as to exercise full control, he forbade carting before sunrise or after sunset. At Étaples the payment was one loaf in twenty, except in the month of August, when it was one in sixteen. The baker was strictly forbidden to take more.

Exemptions from these banalités are, from the nature of the service rendered, not frequent. That the proprietor should have his corn ground free, is often among the conditions on which the miller holds his office. Arrangements between neighbouring proprietors are not uncommon.

Thus, the inhabitants of Nova Villa, near Arras, grind, *ex consuetudine*, at the mill belonging to St. Vaast, at Athies; the lord of Nova Villa, in return, grinds all the corn required for his personal needs, free.<sup>2</sup>

(A.D. 1146): and especially *Cartulaire de Guiman*, e.g. 'de piscatione ab Anzen usque in Athies'; 'et in ipsis aquis nullus mortalium vel retia ad pisces decipulas ad aves locare vel aliud quodlibet ingenium struere seu navem conducere potest.'

<sup>1</sup> It appears to be assumed (e.g. by Sée) that the furnagium existed in the ninth as in the twelfth century. It must be noticed, however, that it is not mentioned in the earlier donations for the region, and that neither the Statutes of Adelard nor the Polyptyque of Irminon give any indication of its existence.

<sup>2</sup> See G. C. ii. no. 345; iii. no. 399: *C. de N.-D. de Boulogne. Choques, Pîces Justif.*, no. 4: 'ita ut omnes qui a porta Odonis usque ad domum Guntii Vituli manent ibi ex debita panes coquant.' *Reg.*

## V. PAYMENTS FOR RIGHTS OF USAGE

In the domain of 850 the woods were the property of the lord, and the common pasture, whose existence was indicated on certain villas, was regarded as his property as well as the lands of those tenants who enjoyed the privilege of feeding stock there. The *Breviatio* gives no information as to whether payment was exacted for this privilege; the assumption is that the right of pasture was included with the grant of the *mansus* or other holding. In course of time the serf became the hereditary tenant of his holding and of the privileges connected with it. It is precisely at this point that we must seek the origin of the numerous payments for rights of usage which appear in the period after the tenth century. A privilege tends to be claimed as a right; the compromise results by which a payment is made which is in the nature of a recognition. The amount remains fixed by custom, and in course of time diminishes seriously in value.

This is the position which we find generally prevailing in these centuries. It is impossible to state rules, as from village to village, and region to region, the custom varies greatly. The principle is universal, however, that only inhabitants of the domain may exercise the right of pasture; we find a host of regulations in the customs of Artois, Guînes, &c., touching this prohibition. The practice of sending the cattle of a stranger to the domain, to pasture as one's own, is strictly forbidden. The common *vaquier*, or herd, was an official of the village.<sup>1</sup>

*Arch. St. O.* (1351): for seizure of four loaves; and *Guiman* under *Villa Felci*.

<sup>1</sup> See *G. C. i.* no. 343 (1170), for division of wood of Acquin between Abbey and tenants: 'hominibus nostris de A. medietatem nemoris quod vocatur Hochtreve servato nobis per omnia dominio et potestate predicti nemoris'; 'si vero viminibus ad aratra sua tantum necessariis indiguerint incidere ea licebit fide tamen data,' etc.

And *G. C. v.* no. 279 (1394) for same: 'et l'autre moytié ont volu et souffert prendre et avoir par leurs hommes, subgés et soubzmanans dont ils ont pluiseurs au dit lieu de Acquin et ainsi en ont usé et joy leurs dis hommes et subgés par telle manière et condition que ils aient tout widié et emporté par dedens le jour St. Jehan Baptiste.'

The Commune of Acquin still has part of this wood (1912).

See also *Samer xiv*: 'et omne jus quod homines vestri de Hesden in nemore ejusdem ville tam in lignis mortuis quam vivis de consuetudine

habere noscuntur.' And iv: 'Boringhem cum usagiis et aisiamentis tam in bosco nostro ibi vicino quam in pasturis.' And iv, O. de B. v.

For common pastures see various maps: and *G. C.* iv<sup>b</sup>. no. 141 (1335), and (1212). Also in 1212: 'totam hanc pasturam ita universaliter Burgensium communem fore . . . ut nullus in ea aliquid singulariter proprium haberet . . . nulli in ea nisi de communi consensu et consilio totius urbis domum habere liceret.' *G. C.* i. 412 (1199) for quarrels between herdsmen of St. Omer and those of Arques: 'usque ad sanguinis effusionem inter pastores burgensium et homines de Arques.' Cf. *C. St. Trond*, ccclxxiv, and for the usuaria see especially *C. d'Orval*, xxviii, xxx, &c. The subject of the rights of 'masuiers' in Belgium has been treated by Errera, *Les Masuirs*, &c. Also *Guiman*, *Villa Felci*: 'Si quis habet pecudes dat pro herbagio 3<sup>d</sup> et obol.'; 'Si habet ad duos mulsores id est suas et alias oves ad societatem dat duo herbagia id est vii den.'

*G. C.* (1416) gives details of an interesting dispute between the Abbey and men of Wizernes, in which the former showed that the right of pasture included no 'propriété de fonds'.

# CHAPTER IV

## THE PEASANT AND HIS HOLDING

### PART I

#### THE ST. VAAST VILLAGES IN THE TWELFTH CENTURY

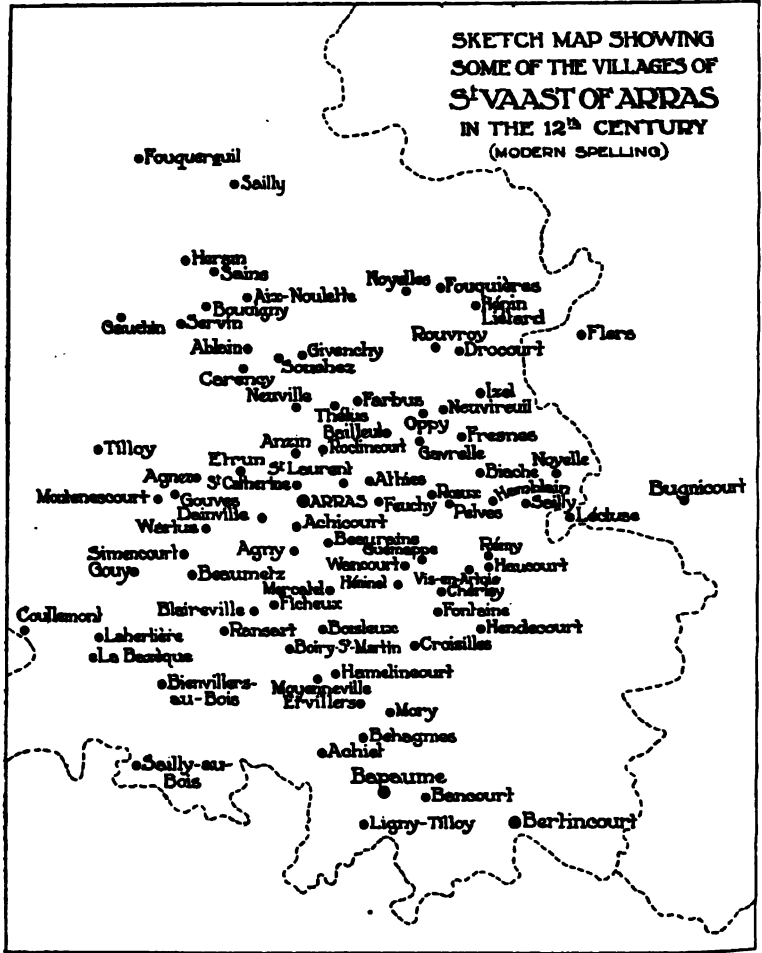
WE have now considered three payments which help us to reconstitute what we may term the economic setting in which the peasant is placed. The tithe is a definite tax of one-tenth of his gross income from his fields; it is a varying proportion of the value of the produce of his stock; it is levied on all on which the sun shines or the dew falls. The gifts made to the village church are compulsory, but are in the nature of a fee. The tonlieu is an indirect tax which affects the peasant, both as buyer and seller; it becomes direct, only in later years, as the gabelle, when a given amount of salt has to be purchased annually.

We must now attempt to ascertain what are the more essential conditions on which the peasant holds his land; the peasant who is not a landholder is, in this age, the exception. In this connexion we may place a great mass of evidence under two main heads.

- i. The Cartulary of Guimann, a twelfth-century record, shows the terms on which more than one thousand tenants of St. Vaast held their farms, or parts of these farms; this document is supplemented and explained by other more or less complete lists of tenants and payments, of which that for St. Bertin at Beuvrequen, of date 1305, may be taken as typical.
- ii. The Records of some hundreds of transactions in land, sales, leases, &c.<sup>1</sup>

<sup>1</sup> e. g.—			
1336	sale at Houlle	110 sol.	per measure
1336	rent       "	20 sols.	"       "
1336	sale at Eperlecques	£8	"       "
1334	rent at Houlle	7s.	"       "
1334	sale       "	£8	"       "

SKETCH MAP SHOWING  
SOME OF THE VILLAGES OF  
ST VAAST OF ARRAS  
IN THE 12<sup>th</sup> CENTURY  
(MODERN SPELLING)



Inference from the evidence presented by i and ii respectively would give conflicting results. The first reveals a system of payments which is largely customary; the second shows us a series of transactions which depend on contract rather than on custom. This system of contract does not replace custom, but exists for a long time side by side with it. To the modern mind it is difficult to reconcile the two sets of evidence. We are accustomed to the rapid levelling of prices within a given area—and though this tendency is perhaps less rapid and complete as regards land than other commodities, yet it is always in operation. We may use the metaphor of a vessel containing water. That the water should be higher at one side of the bowl than at the other: that its surface should be irregularly pitted: that these inequalities should be stable rather than momentary: all this is difficult for us to realize. Yet we imagine that the bowl of water thus arranged represents fairly well the aspect of mediaeval life with which we are dealing. It was possible for two apparently incompatible systems to exist side by side.

#### THE LANDS OF ST. VAAST

*(Second half of the twelfth century.)*

Let us now proceed to examine the evidence presented by the Cartulary of Guimann. The whole of this record was compiled between the years 1170 and 1192.

1332	rent at Houle	6s.	per measure	
1332	rent "	20s.	" "	
1329	rent "	7s.	" "	
1327	ad vitam "	9s.	" "	rietz at 2s. per m.
1314	rent "	£1 4s.	" "	
1300	rent "	14s.	" "	
1298	rent "	6s.	" "	
1297	sale "	£7	" "	
1296	£300 cash for rent	£40		
1293	sale at Quelmes	£12	" "	
1286	sale at Herbelles	£4 16s.	" "	
1277	rent "	£1	" "	
1272	sale "	£8	" "	
1271	sale "	£8 10s.	" "	
1269	sale at Gravelines	£12 2s.	" "	

These instances are taken from *G. C.* under above dates: we know nothing usually of the quality of land.

The payments and services described as due to the Abbey from the tenants in various villages are rendered *ex antiqua consuetudine*. We have seen that the charters inserted, referring to the grant of theloneum, go back to the previous century, and we may safely suppose that the system shown goes back at least as far.

The second part of Book II of the Cartulaire, that headed 'De Diversitate Districtorum,' includes the list of tenants who hold from the Abbey in more than 120 different localities. These are grouped thickly round Arras, but they extend almost to Dunkirk; and in the direction of Amiens they march with the villages of the Abbey of Corbie. The record is of great value in giving us a comprehensive account of the conditions on which about 800 of the inhabitants of Arras and its suburbs held their houses and land; it is still more important for our purpose as throwing some light on the terms on which farms were held in villages covering a large part of the province of Artois.

We must notice in the first place that the unit of tenure, which serves as the basis of the payments recorded, is the curtile; of these not less than 1,300 are included in Guimann's record. It is important that we should understand clearly the significance of this term. We have seen that the mansus of the ninth and earlier centuries continues to exist in name in later centuries; in reality, an important change has taken place. The dependent mansus of the earlier villa was always a given area of land. A house was probably built on part of this, but it is on the area of land that stress is laid in the ninth-century records. But the curtile of the St. Vaast records, and the mansus of those of St. Bertin, is essentially, in this age, that part of the holding on which the tenant's house is built; and, of the two, it is the house and buildings, that is, the farm in the narrower sense, which is now more prominent than the land.

Throughout the Cartulary of Guimann, the land lying in the curtile is distinguished from that lying *in territorio*, that is, in the large stretches of arable. We have seen that the tithes from these two are usually distinguished.

As to the amount of land thus connected with the farm buildings we can, unfortunately, obtain no information from this record. Probably it usually comprised a few acres only, often only one or two. With this understanding of curtila as a house with outbuildings and immediately adjacent land usually enclosed, we may proceed to examine the conditions on which the curtila of St. Vaast were held in the second half of the twelfth century.

### Bernevilla

At Bernevilla (now Berneville, 5 miles to the south-east of Arras), St. Vaast had a demesne farm and 36 curtila. We are reminded in the first sentences of the record of what we have called the 'setting' in which the tenants of these curtila are placed. St. Vaast possesses justice, tonlieu, the special tonlieu of wine (*foragia*), the furnace; the church and altar belong to the Abbey, which receives the oblation made at Christmas, the Purification, and Easter, with the whole tithe from both curtila and territoria. For more than one hundred villages this description is repeated. There are local variations and omissions; thus here at Bernevilla St. Vaast has not the banalité of the mill.

The 36 curtila are described as paying rent as follows (*talem per annum censum debentia*):

22	pay	15 <i>d.</i>	and half a measure of oats.
11	"	18 <i>d.</i>	" one " " "
2	"	18 <i>d.</i>	" half a " " "
1	pays	9 <i>d.</i>	" one " " "

The name of the holder is given in each case.

At Servin, 48 tenants pay as follows for their curtila :

1	pays	1	measure of oats.
2	pay	1½	measures " "
34	"	2	" " "
3	"	2½	" " "
1	pays	2½	" " " and 2 fowls.
3	pay	3	" " "
1	pays	3½	" " "
1	"	4	" " "
1	"	4	" " " and 2 fowls.
1	"	6	" " "

Twelve tenants, of whom four are not included in the above 48, pay, in addition, to the Abbey *de incrementis*, varying amounts of produce, one fowl and one measure of corn being the most common.

Twenty-two of the curtilia, which lie near the church where formerly the villa of Servin was situated, are liable to an additional payment, usually of twelve pence. The names of all but three of these tenants occur in the above 48. At Gaverella, of 42 tenants, 32 pay in pence, 7 in pence and fowls, 2 in fowls only, 1 in pence, fowls, and loaves. At Yser, 35 curtilia all pay in money, at the rate of 25 pence per curtile.

To sum up the record as to 1,131 curtilia, about one-quarter pay in money only; about one-quarter pay in money and corn, and the rest pay in money and capons, and (exceptionally) loaves.

There is generally for each locality one standard payment, which, in the case of those paying money, is, most frequently, one shilling.

The curtilia at Bernevilla owe *relevatio* at change of tenant, *ad misericordiam*, but the amount was almost certainly fixed by custom. At Servin it is fixed at 3s. If the tenant sells what he holds from St. Vaast, *relevatio* is paid on the transfer *ad misericordiam*. In one case we find curtilia which owe 26d. as *relevatio*, and the seller and buyer both owe the same amount in case of sale. The common formula is, however, *relevatio ad misericordiam*.

The fact that we are in ignorance of the quantity of land attached to the curtilia, prevents us from arriving at any close estimate of the amount of these payments. The general impression derived is that they were not heavy, and certainly the money payment must rapidly have become almost nominal, with the decrease in the value of money.

For the land held by the tenants of the curtilia in the territory of the village, the Cartulary gives little detailed information. Guimann records for each village the general conditions on which land is held of the Abbey, but says little as to the resulting revenue.

## Land held 'ad societatem'

In more than thirty villages St. Vaast possessed land which is described as held *ad societatem*, that is to say, in partnership. The system was common to the whole of this region in these centuries; in the next century we find it frequently mentioned in the region of St. Omer, notably on the lands of the Abbey of Beaulieu, as *soieste*.<sup>1</sup> In the next century we have the record of the tithes due from the Medietarii, or Métayers, of the Count of Boulogne, at Questrecques; and of that levied on the so-called 'crementum', or produce of stock let out on condition of receipt of a share of the produce.<sup>2</sup>

For only about one-third of the villas where land was held on this tenure are we given details. Sometimes the number of measures is recorded; it is usually small, ranging between three and twenty-four. On two occasions the land is estimated *ad carrucam*, and, at Symencourt, we are told simply that there were three *culturæ ad societatem*.

For three localities we have details which throw some light on this system.

At Yser, St. Vaast has 80 and 13 measures *ad societatem*. For the 13 measures the Abbey provides half the seed, and receives half the produce plus the tithe, and a further proportion of the fruits called *terrarium*. This appears to have been a formidable burden. The tithe is one-tenth; the *terrarium* was often the same, which leaves only three-tenths of the produce for the tenant in return for his labour.

For 74 of the 80 measures, St. Vaast provides no seed, and receives half of the produce, the tithe, and the *terrarium*. From the six measures no *terrarium* is due. At Fraxino (Fresnes les Montauban), the Abbey provides two parts of the seed and receives two parts of the crop, with *terrarium* and tithe.

At Bigartio and Pelven, the general rule is that St. Vaast sows two parts; in the *societas* known as *de nemore*, the

<sup>1</sup> Cf. G. C. iv. pt. 2, no. 102: for 25 mesures 'en soieste' at Lollinghem. G. C. iii. no. 418: 'pour aler à leur soiestes'. C. de Licques, lx, &c.

<sup>2</sup> C. de Samer, xii: 'totam decimam medietariorum comitis', 'decimam crementorum'.

whole of the seed is provided ; in the *feodum* of Theodoric the Villicus and that of his brother, one-third only is sown by St. Vaast.

The general statement is also made that from the hereditary *societas* the Abbey receives half the crop and the tithe.

Like the curtilia, the lands held *ad societatem* pay relief, usually, *ad misericordiam*.

It is clear that no rule can be given as to the amount of seed provided by the Abbey. We cannot even say with certainty that these three instances are given as exceptional. Possibly the liability to terrage of land held *ad societatem* was not the rule. But the tenant of such land is here shown as in only one respect more favourably situated than the hired labourer. He has some claim to a portion of land. The advantage of such hereditary possession lay chiefly in the possibilities for the future, and the changes it might bring.

#### Terragium

The terrage, or *champart*, as it was called in other districts, is one of the commonest forms in which the seigneur repays himself for the grant of his land. It closely resembles the tithe, inasmuch as it consists of a certain proportion of the sheaves produced by a given area of land. The proportion varies with local custom. It is clearly described for us as it existed at the beginning of the fifteenth century, in the St. Bertin region, 'on which lands I have a certain right, called Terrage, to wit, from each 100 sheaves at harvest, grown on the said lands, eight sheaves, and those who hold the said lands are to deliver to me or my agent the said sheaves, before the crops are taken from the fields.'<sup>1</sup>

Like the tithe, the terragium lent itself to subdivision. The result must often have been extreme inconvenience to the tenant. In 1277, St. Bertin had the right to receive from the seigneur of Heuchin half the terrage on 3, 5, 3, 10, 4½, and 5 measures, and the whole terrage on 4 measures ; and we must

<sup>1</sup> *G. C. v* (1402) : see also *G. C. ii. no. 3*, and *v. no. 103* (removal of crop to avoid rain) ; and *G. C. ii. no. 260 bis* : terrage of 1 sheaf per measure ; and *Coutume du Boulonnais*, xxxvi.

remember that tithe would have to be collected from these same pieces.<sup>1</sup>

At Oreymeay, near Bapaume, St. Vaast had the tannage in the whole territory, and, 'if he who collects this on behalf of the Church is not found present in the field when the crop is reaped, he is to be sought for as far as Sapenez, if he dwell there, or as far as Bapaume, if he dwell there'.

In no case for the St. Vaast villas are we told the proportion of produce taken as tannage. At Rincurt, the payment is in money, and is of 4*d.* from all fields, whether big or little. We have seen that at least some land paid both tannage and tithe as well as part of the produce. The language of the Cartulary gives the impression that much of the land *in territorio* was held simply at tannage. For many villas the formula is used, 'land held *ad societatem* or *ad terragium*, pays relevatio *ad misericordiam*.'<sup>2</sup>

#### Land held 'ad redemptionem'

In more than a score of these villages the existence of land held *ad redemptionem* is recorded. We can say no more of this land than that it is redeemed each year by a small payment, often of one penny for each measure, and in no case of more than 4*d.* per measure. The same land may be subject to tannage, but the distinction is always made between land held *ad redemptionem* and that held *ad societatem*. There is, unfortunately, a serious gap in our information. We are given the list of curtilia, the names of their tenants, and the rents they paid; we have indications of the terms on which the land lying outside the curtilia was held. We are told nothing as to the proportion in which holders of curtilia held *ad societatem* and *ad redemptionem*. In one case only is it made clear that it was indeed the holders of the curtilia who

<sup>1</sup> G. C. ii. no. 26.

<sup>2</sup> For disputes concerning rights to enclose and avoid tannage vide G. C. vii. no. 100 (1455): 'Ce dit defendeur avoit et a fait enclore de vives haies plantie le dit tenement contemptieux et le mis a usage de pastich ou manoir par quoy on ne avoit plus labouré ne assememchié le ditte terre et par ce moienne avoient ni ont y ceux demandeurs plus peu prendre le dit droit de tannage' (*Roquestor*).

held also the land *in territorio*. At Juvencel, St. Vedast had a demesne farm, land held *ad societatem*, and 7 curtilia, each paying 6*d.*, 2 loaves, and 2 capons, when held by hospites. If the hospites should leave the land, their *societas*, the tenants of the remaining curtilia are to share it until other tenants are found.

We have now considered the general system of payments on these villages as far as it is described in the Cartulary of Guimann. A few miscellaneous payments may be noted. A common contribution is that of bundles of reeds. A payment which well illustrates the completeness of the domanial monopoly is that of the pence due from all reapers at harvest time. At Dainville, the Abbey has two parts of these pence, which are described as paid by all male harvesters, whether inhabitants or coming from outside the village to help in the gathering of the crops.

## CHAPTER V

### THE PEASANT AND HIS HOLDING

#### PART II

BEUVREQUEN AND NEIGHBOURING VILLAGES, c. 1300

#### The Terrier of 1305.

The first pages of the volume containing the St. Bertin accounts for the village of Beuvrequen 1305-1491 are occupied by a list of the tenants, the amount and situation of the land each held, and the payments due from them, as these existed at the end of the thirteenth century.<sup>1</sup> Beuvrequen, now a village of 327 inhabitants, nine kilometres from Boulogne in the direction of Marquise, appears to have been acquired by St. Bertin at some time previous to 1139. In the Terrier are included lands and tenants belonging to the villages of Waskinghen, Wimille, Marquise, Oufertun, Luninghem, Basinghem, Odinghen, Maninghen, and Ultra Aquam (the modern Outreau, situated behind the existing Maritime Station at Boulogne). To the student of the economic history of the region the evidence of the terrier is of very great importance. It is, we believe, the earliest detailed account of this kind; there is abundant evidence that it provides us with minute particulars about one group of villages, whereas for our information concerning the aggregate of villages in the whole region we have to rely on detached references to individual transactions or tenants.<sup>2</sup> Moreover, the terrier is plainly but one of a series, and might have been paralleled at any time during the thirteenth century, to go no further back.

#### The Economic Setting.

We find the peasant placed in much the same economic

<sup>1</sup> *Arch. Dép. P.-de-C.* : and *Soc. Acad. Boul.*, tome 17.

<sup>2</sup> Cf. Transactions for B. and neighbourhood : *G. C.* iii. no. 245 (1269), no. 418 (1287), no. 361, no. 252, &c.

setting as that in which we have found him in the villages of St. Vaast in the twelfth century. The Abbey of St. Bertin possesses the right of tonlieu: the furnace and mill are banal. The Abbey claims, too, full rights over the village common, described later in the volume as containing between forty and forty-eight measures *derbe et de pasture*, and as bounded at one end by a piece of meadow belonging to St. Bertin and at the other by a farm-house and the land around it.<sup>1</sup>

#### Moutonnagium.

Whoever owns eight sheep or more pays 12*d.* as Moutonnagium; those having less than eight pay 2*d.* each sheep.<sup>2</sup> No beast from outside Beuvrequen is allowed to graze on the land under a penalty of forfeit, and no inhabitant of the parish may take the beasts of an outsider to graze with his own. Such payments and prohibitions are universal in the region, and the Coutumes always include the record of them.

#### Fersenga.

From a few of the tenants in these villages is due a tax known as *fersenga* (OF. *fressenge*). This is a payment for the right of keeping pigs, and is here recorded as paid in money. It probably represents a commuted payment in kind for the right of feeding pigs in the woods belonging to the Abbey.

#### Hostagium.

We have already, in our survey of the history of the mansus in this region, referred to the method of description employed in this terrier, and to the distinction made between mansus and outlying land. From each mansus is due a payment

<sup>1</sup> Memore que Mons l'abbé de St. Bertin pour s'eglise à toute justice et seigneurie en la commune de bæuvrequen sy grande et sy longue que elle sestent, laquelle commune contient environ de 40 à 48 mesures derbe et de pasture aboutans d'un bout devers l'amont à 1 pré appelé le Willenne lequel pré est du demaine de le maison de bæuvrequen appartenant à Mons<sup>e</sup> et d'autre bout devers l'aual aboute à le maison et terres le nommé haiche, qui jadis tint Jehan destellant et Marguerite se fille et du costé devers le Nort (1411).

<sup>2</sup> Cf. G. C. iii. 418 (1287): 'une droiture ke on apiele moutonage'; and Coutume du Boulonnais (1761), xxxv: mouttonage.

known as Hostagium. It is thus defined in the Cartulary of Guimann: *de hostagiis autem id est censibus domorum*.<sup>1</sup> We are not told its amount, but may suppose it to have been a small sum, possibly the shilling recorded as due in the twelfth century from the houses on the St. Vaast estates.

#### Winsaine and Waitedeniers.

All who pay Hostagium owe also an Easter gift to the abbot of twelve eggs, known as *Winsaine*: the same tenants pay at the Purification two *Waitedeniers*. These are probably the remains of a commuted duty of guard (Flemish *wachte*, English *watch*). We find the people of Waskingen claiming that they are not liable to the payment of the Easter gifts because they have not the advantage of pasture enjoyed by those of Beuvrequen: but the official responsible for drawing up the terrier is advised not to accept this plea, as the eggs are owed *de Winsaine*, and not as payment for the right of pasture.<sup>2</sup>

#### 'Kien-Avene.'

In the list of tenants, Amalfus Brassator is inscribed as paying to the Count of Boulogne *1 pokinum avene qui dicitur Kien-Avene*. We may translate 'Kien-Avene' as 'dog-oats'; it was the corn destined to serve as food for the hounds of the count.

The question might be considered one of merely antiquarian interest were it not that it introduces us to a subject of wide importance in mediaeval life—that of the burden on proprietor and tenant involved in the obligation to support the superior during a visit; the tax was increased by the cost of maintenance of hounds and attendants.

The payment of 'Kien-Avene' also illustrates the principle of ear-marking which is found in the book-keeping of the

<sup>1</sup> *C. de Guiman*, p. 101: 'de hostagiis'.

<sup>2</sup> 'Et nota quod isti volunt dicere quod non debent 12 ova ad pascha, licet hostagium debent sicut illi de B., pro eo quod non habent avantagium pasture sicut illi de B., sed credimus quod non est eis credendum quia illa ova nobis debentur de Winsaine non ratione pasture.'

period.<sup>1</sup> It is probable that rent due from St. Bertin to the Count of Boulogne had been thus allocated.

The interpretation of 'Kien-Avene' as 'dog-oats' is supported by the mention of *1 panem ad canes* in an agreement between St. Vaast and Baldwin, Count of Flanders, and by a very interesting record to be found in the Chronicle of the Counts of Hainault for the years 1404-5. The latter is a quittance delivered by Jean de Maubeuge, *veneur de Hainaut*, for the sums required for the upkeep of the *grans kiens* of the count during the winter of 1404-5. The account includes a payment to Jehan del Kevee for baking *v muis iij rasieres de bled* into bread for the said *kiens*.<sup>2</sup>

#### THE HOLDINGS AT BEUVREQUEN AND NEIGHBOURING VILLAGES, c. 1305

We now proceed to examine, at closer quarters, the peasant and his holding as we have it revealed in the terrier.

In the first place, the total amount of land included in the portion of the record dealing with Beuvrequen is about 560 mesures. The unit employed is slightly larger than the English acre, and we shall not err seriously if we consider these mesures as acres for purposes of comparison. This area, then, of 560 acres is held by no fewer than sixty tenants, giving an average holding of less than ten acres. The village contains 6 holdings which the student of rural life in Artois, in the Middle Ages, will consider as large farms; that is, they are of areas greater than 20 acres, and amount in total to more than 230 acres: thus we have about 330 acres divided among the remaining 54 tenants, giving an average holding of between 6 and 7 acres. This average would conceal, however, much information as to the actual size of the holdings at Beuvrequen in 1300.

<sup>1</sup> Cf. *The Statutes of Adelard*, and a very interesting document of date 1202 in *Arch. du Chapitre de St. Omer*, liasses 826-7, dealing with the arrangements for the upkeep of the canons of St. Omer.

<sup>2</sup> Cf. also *G. C.* (1269), no. 252, *Nouveaux Acquets*: also *Registre Quelmes*, Accounts of Greneterie: and ii. 300 (1228). For right of *gltte* see *Guiman*, 'De Bigartio', and *G. C.* iii (1256), and ii. no. 363, &c.

We find that out of 60 holdings, 26, or 43 per cent., are of fewer than 5 acres;

16, or 27 %, are of areas 5 to < 10 acres  
 12, or 20 %, " " " 10 to < 20 "  
 and 6, or 10 %, are 20 acres and upwards.

Turning to the evidence for villages other than Beuvrequen included in the terrier, we have a total of 62 tenants, of whom—

45	have holdings of < 5 acres	= 73 %.
8	" " " 5 to < 10 acres	= 13 %.
5	" " " 10 to < 20 acres	= 8 %.
4	" " " 20 or more	= 6 %.

These figures would be sufficient to show a village, at a date five hundred years before the Revolution, in which subdivision had gone very far: of a total of 122 tenants, 71 hold less than 5 acres and 95 hold less than 10.

We may complete the picture of the land in these villages by repeating that this *morcellement* was accompanied by dispersion. One farm at Beuvrequen is in 19 dispersed pieces, another in 18, and so on. The 62 tenants at Beuvrequen have their arable in more than 150 scattered pieces.

#### THE ABBEY FARM AT BEUVREQUEN IN 1300

To complete our picture of the way in which the territory of Beuvrequen was subdivided at the end of the thirteenth century, we must inquire what area of the land was directly cultivated by the Abbey. This information is supplied in part by a lease of date 1269 A.D.<sup>1</sup>

There we find 36 measures described as sown with corn and 61½ as bearing spring corn, giving a total of 97½ measures. Allowing for about one-third as fallow, we may assume 150 measures or acres as being the area of the Abbey farm. This may be compared with the 46½ measures of the two next largest farms. Like most of the other holdings of the village, the area belonging to St. Bertin lay dispersed over the arable of Beuvrequen.

<sup>1</sup> G. C. iii. no. 411.

## RENTS AT BEUVREQUEN IN 1300

The payments directly associated in the terrier with the tenure of the holdings we have attempted to describe, are made in oats, wheat, barley, beans, and money; the latter plays, on the whole, a minor part.

The question inevitably arises, is it possible from this record to form an approximate idea of the material conditions of these tenants? Were they rack-rented? How does the 'rent' they were expected to pay compare with its modern equivalent?

Careful examination of the most important work on the history of prices in France,<sup>1</sup> and more particularly of the tables contained therein, leads to the conclusion that these questions are not likely to receive any satisfactory answer if inquiry is pursued along the line of comparison of prices. The estimates made in that work are based on figures obtained from places which are widely distant, and among which the villages of Artois figure only to a small extent. The deductions made are useful chiefly when dealing with tendencies acting over long periods. It would appear unwise to use them in this inquiry. Doubtless sufficient materials exist, more particularly for the period after 1300, for a history of prices in Artois. The account-books of St. Bertin and St. Vaast would in themselves go far towards supplying the basis for such a history.

The information as to prices which we have gathered during the preparation of this essay has shown much apparent contradiction and discrepancy, which would perhaps be explained by careful and exhaustive research, but at the same time has convinced us of the danger of using such statistics at this stage.

**Method of Examination.**

We propose then to ask one question only as to these rents: what proportion did they bear to the area of the land

<sup>1</sup> Le Vicomte d'Avenel, *Hist. écon. de la propriété, des salaires, des denrées et de tous les prix en général, 1200-1800.* (4 vols., 1894-8.)

which was to contribute them? Inquiry along this line involves the assumption that the rent in kind paid by the peasant was the produce of the land he held and was not bought or received as wages. Where the opposite is true, the value of the comparison is proportionately lessened.

We have made direct appeal to the value of money, in classifying certain rents as nominal; we may note here that it is sufficiently established that the few pence due from certain tenants were of such low value in 1305 as to justify this classification. Further, there is internal evidence in the case of subletting, which enables us to form a safe comparison for the other rents paid in money.<sup>1</sup>

### The Measure.

The measure of capacity employed at Beuvrequen in 1300 was the *poquin*. According to the existing tradition, which we have, after careful inquiry, found no reason to doubt, this was equivalent to two hectolitres, or about  $5\frac{1}{2}$  English standard bushels.

Examination of the figures of the terrier enables us to group the rents as follows:

Of 122 tenants,

- 22 pay in oats only,
- 10 „ „ wheat only,
- 8 „ „ barley only,
- 20 „ „ various combinations of oats, wheat, barley  
and beans,
- 13 „ „ corn and money,
- 9 „ „ money only,
- 40 „ „ nominal rents.

<sup>1</sup> See under *Petrus Lathomus, Eustachius Goidibur, &c.*, in the *Terrier*.

Examining first the rents paid in oats only, we have :

*Rents in Oats.*

Area held in measures.	Amount paid in English bushels.	Average per measure or acre.
4	5	1.25
4	$5\frac{1}{2}$	1.375
$2\frac{3}{4}$	$27\frac{1}{2}$	10.0
$2\frac{1}{2}$	$8\frac{1}{4}$	3.3
$1\frac{3}{4}$	$1\frac{3}{8}$	0.79
$2\frac{1}{2}$	$14\frac{1}{2}$	5.8
$3\frac{1}{2}$	$5\frac{1}{2}$	1.57
$1\frac{1}{4}$	$2\frac{3}{4}$	2.2
2	$12\frac{3}{8}$	6.19
$4\frac{1}{4}$	$4\frac{1}{2}$	1.06
2	$6\frac{7}{8}$	3.44
2	11	5.5
$3\frac{3}{4}$	$5\frac{1}{2}$	1.47
7	16	2.29
5	22	4.4
5	$27\frac{1}{2}$	5.5
5	$16\frac{1}{2}$	3.3
5	$8\frac{1}{4}$	1.65
$16\frac{1}{2}$	$16\frac{1}{2}$	1.0
11	$8\frac{1}{8}$	0.74
$13\frac{1}{4}$	24	1.8
11	$38\frac{1}{2}$	3.5

Giving the average per acre per tenant as 3.1 English bushels.

*Rents in Wheat.*

For the rents paid in wheat, we have :

Area in measures.	Amount of rent in bushels.	Average per acre.
$\frac{1}{2}$	$4\frac{1}{8}$	8.25
$3\frac{1}{2}$	$5\frac{1}{2}$	1.6
$\frac{1}{2}$	$4\frac{1}{8}$	8.25
1	$5\frac{1}{2}$	5.5
1	$2\frac{3}{4}$	2.75
6	$16\frac{1}{2}$	2.75
$1\frac{1}{4}$	$5\frac{1}{2}$	4.4
3	$5\frac{1}{2}$	1.8
1	$4\frac{1}{8}$	4.1
3	$5\frac{1}{2}$	1.8

The average rent per acre = 4.12 bushels.

*Rents in Barley.*

Eight tenants pay their rent in barley :

Area in measures.	Amount of barley in bushels.	Average.
2	11.0	5.5
2	5.5	2.75
$\frac{3}{4}$	1.4	1.9
2	3.8	1.9
2	5.84	2.92
8	44.0	5.5
7	24.5	3.5
11	44.0	4.0
		<hr/> 8 27.97
		3.49, or
		3.5 bushels per acre.

*Rents in Mixed Corn.*

There are twenty tenants who pay rent in oats, barley,<sup>f</sup> and wheat, or in any two of these. In two cases amounts of rye are due, and in two others beans are included in the rent. We give the complete lists of the rents due :

Area of land in measures or acres.	Bushels of : Oats.	Wheat.	Barley.	Rye.	Beans.
6	—	5½	5½		
5	13¾	8¼	—		
8½	22	5½	11		
5	5½	—	5½		
6½	5½	—	5½		
6¾	11	1⅝	—		
9	24¾	1⅝	5½		
6½	11	2¾	—		
8	5½	16½	5½		
5	—	1¾	16½		
11	—	14¼	24⅝		
12½	2¾	30¼	—		
12½	27½	8⅛	8⅛	5½	
15½	33⅛	—	5½		
14	—	11	5½		
44	20⅝	20⅝	60½		
74	86½	20⅝	16½	5½	9⅝
52	52¼	13¾	16½		
23	9⅝	16½	—		
38	30	6⅞	—	—	6⅞

An average obtained by treating these rents as composed of one kind of corn only, that is to say, by adding the number of bushels involved in each rent, hides of course more of the facts than the average taken in the previous cases. For so much as it is worth, however, we may note that the average obtained in this way works out at 2.12 bushels per acre. The amounts of corn involved are :

361 $\frac{1}{8}$  bushels of oats, 185 of wheat, 192 of barley, 11 of rye, and 16 $\frac{1}{2}$  of beans respectively.

*Mixed rents in cash and corn.*

There are thirteen tenants holding land from St. Bertin in these villages whose rent is paid in money and corn combined in various proportions.

The amounts of land they hold and their average payments per acre are as follows :

Area of holding in measures.	Amount of Corn in bushels.	Money.		Average Corn.	Average Money.	
		s.	d.		s.	d.
3 $\frac{1}{2}$	5 $\frac{1}{2}$	6	0	1.6	1	9
3	6	9	10	2.0	3	3
3	16 $\frac{1}{2}$	17	0	5.5	5	8
2	1 $\frac{3}{8}$	16	0	0.7	8	0
7 $\frac{3}{4}$	13 $\frac{3}{4}$	10	0	1.8	1	3
17	27 $\frac{1}{2}$	14	0	1.6		10
18 $\frac{1}{2}$	9	47	10	0.5	2	7
14 $\frac{1}{2}$	12 $\frac{3}{8}$	21	8	0.9	1	6
11	19 $\frac{1}{8}$	7	6	1.7		8
46 $\frac{1}{2}$	9	9	10	0.2		3
28 $\frac{1}{2}$	9	47	10	0.3	1	8
46 $\frac{1}{2}$	37 $\frac{1}{8}$	11	10	0.8		3
35	11	15	0	0.3		5
				13)17.9	13)28	1
				1.4	2	2

But nine tenants pay in money only ; the details are :

Area held.	Amount paid.		Average per measure.	
	s.	d.	s.	d.
1½	12	0	8	0
1	9	0	9	0
1	6	0	6	0
1	5	0	5	0
9	16	8	1	10½
16	17	8	1	1½
17	17	6	1	0½
12½	3	0		3
32	42	0	1	3½
			9)33	6½
				3 8½

The remaining tenants with whom the terrier deals are 42 in number. We have grouped them here as paying a nominal rent.

We may observe, in the first place, that if these rents may be described as nominal, their holdings are little more than that. Thus, these 42 tenants hold together about 100 acres of land. This total is thus divided :

5	tenants	hold	5	acres	or	more	(viz. 7, 6, 5, 7, 7)
3	"	"	between	4	and	5	
6	"	"	3	acres	or	more	but less than 4
8	"	"	2	"	"	"	3
14	"	"	1	acre	"	"	2
6	"	"	less	than	1	acre.	

Four of these pay a small quantity of corn ; half of them pay only a rent of eggs, or eggs and poultry. Money payments are chiefly for *waite deniers*, *moutonnagium* or *fresinga*. One tenant owes a small portion of *brais*, the only reminder we find of the *bracia* or malt of the Breviatio. A payment of 12 eggs, 4½*d.* for *moutonnagium*, 4½*d.* *fresinga*,<sup>1</sup> and 2*d.* for *waite deniers* appears to be typical for this poorest class of tenants.

<sup>1</sup> Cf. *C. de St. Aldegonde*, no. 61 (1319) : 'unam raseriam pandochii vulg. brays ad fac. servisiam.'

### The Incidence of Rent.

To sum up the results of our analysis, we have the following averages:

Average rent in oats	= 3.1 bushels per acre.
" " wheat	= 4.12 " "
" " barley	= 3.5 " "
" " mixed corn	= 2.12 " "

Average rate in money and corn = 1.4 bushels plus 2s. 2d. in money.

Average rent in money = 3s. 8½d.

It need hardly be said that we are confronted with considerable difficulties when we attempt to deduce from these figures facts as to the material condition of the peasants in the villages under consideration.

In the first place, there is much difference of opinion as to the amount of produce yielded by land in the Middle Ages. The general opinion is that expressed by M. Sée, that it was from one-third to one-half of the amount yielded at the present day.<sup>1</sup> The chief crop in the St. Bertin villages was oats, and a yield of 40 bushels of oats might be taken as a fair yield at the present time. One-third of this, that is, between 13 and 14 bushels, might be taken as the yield in 1305. Comparing these figures with the rents given above, we should be inclined to consider the rents required as not considerable. Certainly a rent of 5½ bushels per measure is common in this region in that traffic in corn-rent, which took the place of transactions in stocks and shares at the present day.

<sup>1</sup> But see Richard : Thierry d'Hirecon *Un Agriculteur Artesien* (13...-1328) in *Bibl. de l'École des Chartes*, vol. liii, 1892, pp. 383-416, and 570-95. He estimates the return in wheat from land at Roquestor as—

7.5 in 1319	8.7 in 1323
9.7 " 1320	7.0 " 1325
11.6 " 1321	8.1 " 1327
8.0 " 1322	

and compares with this a return c. 1892 of 11 to 13-fold. These figures were, however, for a large and well managed farm.

## The effect of 'Morcellement'.

But there are important considerations to be taken into account here, which weigh strongly against the opinion that these corn-rents were moderate or light.

The first, i. e., that the peasant was at the mercy of the seasons, is sufficiently obvious, but a more important one is that we have to take into account not only the average due per acre, but also the total amount held; and it is here that we are struck by the difficulty which must have been experienced by the smallest holder in obtaining year by year the amount of rent exacted.

If we take, as an example, the occupant of land which is saddled with a perpetual rent in oats, we find rent varying from 6.18, the highest, to 0.7 of a bushel, the lowest.

But the average of 0.7 bushels refers to a tenant who holds 11 acres, while the higher figure represents the average payment from a holding of but  $1\frac{1}{4}$  acres. Reference to the lists we have given will show that on the holders of small areas the pressure is comparatively greater. We have to deal, then, with an average payment per acre which can hardly be thought high in itself, but which cannot be considered apart from the facts as to size of holdings.

Thus whatever conclusions we may draw from comparison of these rents in corn and money with the amount of land held, it is to be remembered that this factor, among those which contributed to form the material condition of the peasant in this age and region, cannot be considered in isolation. Nothing could be more misleading than such average rents of land considered in this way. The rent is paid for what in the majority of cases is a very small portion of land. We have, revealed in the Terrier, and confirmed generally by contemporary documents, an extent of *morcellement* which was probably in excess of that which existed on the eve of the Revolution, and it is impossible to disregard this fact in treating of the material condition of the peasant. These amounts of land, held free of all contribution, could not have sufficed to make him prosperous. The magic of property

may do much, but we cannot suppose that these holders of dispersed scraps of land were, by the fact of possession, even on favourable terms, economically well placed.

The process of *morcellement* is shown clearly enough in many of the entries of the Terrier, which may be considered as presenting us with a kind of transverse section of the agricultural life of this region. We see a holding, already tiny, further broken up by arrangement among the inheriting children, in the case of Gerardus, Johannes, and Leise le Gast, who hold  $1\frac{1}{4}$ , 1, and 1 measure respectively; at the time of the Terrier, they still pay their rent jointly. The general process is illustrated further in almost every entry of the record; for, it will be seen, there are few holdings which are not composite in the sense of resulting from acquisition by inheritance, marriage, and purchase. It is true that the pieces which form the holdings in these villages are being constantly reconstituted in fresh groups, but the general and marked tendency with the passing of generations is towards smaller holdings. That *morcellement* had not yet reached its limit in 1305 appears to be shown by the fact that practically all measurements in the Terrier are given in measures and half measures; in the next century, the verge or rod, of which 100 went to the measure, is very frequent in similar descriptions.

#### Custom and Contract.

The actual working, the activities of village society at this date, are further illustrated when we consider this tenant-roll from the point of view of the method by which the tenant of 1305 has come into possession of his land; for the Abbey takes care to record this whenever possible.

We may remark, in the first place, that what we may term the normal method of acquisition is still that of inheritance. The Terrier, for instance, names Johannes de la Cromme son of Petrus de la Cromme, and grandson of Thomas de la Cromme: the record gives thus, both a reference to an earlier Terrier and the explanation of possession. After the name of the tenant, follows almost invariably one of the words *filius*,

*filia, relicta, uxor.* Land goes from father to children; and the Abbey receives the *relevatio* exacted at succession.

We have referred above, as illustrative of the process of *morcellement*, to such entries as 'Willelmus Jungfroue, husband of Agnes, daughter of Johannes Parent, holds what his wife has inherited'. There are many entries in this style.

### Sales.

But there are few holdings at Beuvrequen which can be described merely as acquired by inheritance or marriage. The number of sales recorded is large; it is plain that in 1305 traffic in land is extensive. We are again reminded forcibly of the village of 1789, or, indeed, of the modern French village. The passion for acquiring fresh portions of land to round off an inheritance, described with such terrible detail in Zola's *La Terre*, is not a modern phenomenon in France, and we see it in full vigour six hundred years ago. Land was passing from hand to hand in a way which must have complicated considerably the task of those who were entrusted with the Abbey book-keeping. Henricus de Rieu has two journals of land; they had belonged previously to Eustache de Broco and afterwards to Eustache de Cahem, William Lathom, John le Vingnon, in succession. Here are five owners for a piece of land, within probably a comparatively short space of time. There are, indeed, no other entries where so many as four earlier holders are mentioned, but in the majority of cases, some portion of the holding has been acquired by purchase. The registers kept in the modern French villages of this neighbourhood are filled with the records of similar transactions.

The Abbey is, apparently, little concerned with these sales, and they must often have taken place without its control. The new tenant takes up the obligation of the old, and is in similar hereditary possession; the chief object of the lord is always to have the land occupied by some one who will keep it in cultivation, and contribute the dues which by long custom are required from it.

**Custom and Contract. The Tenants 'ad Censam'**

We have said that the normal method of land-holding at Beuvrequen was that whereby a holding was cultivated from generation to generation by members of the same family, without change in the payments due from them to the Dominus, in this case, the Abbey.

Now, it is obvious that this set of conditions, if universal, would be subject to change from one direction only; the tendency to *morcellement* would, with free play, with the passage of time, bring the tenures of the village into an increasing number of hands. At the same time the amount of produce and money due from them would not increase.

With custom thus governing the normal relation between lord and tenant, it is not at first sight easy to see from what side change could come. To bring about change in this relation would require the extinction of a family and a new bargain between lord and new tenants; or it would require that the lord should grant out under new conditions some portion of the domanial reserve which he had hitherto kept for direct cultivation.

The case of land returning for redisposal to the Abbey through lack of heirs is not common. There is, indeed, in the Terrier one instance of a house and three journals of land which was in the hands of the Abbey *per defectum hereditatis*; it is regranted to Thomas Caporius for one measure of corn and two capons. Thus there is, in this solitary instance which the Terrier affords, no attempt to change from custom.

As regards any letting of parts of the demesne land we have no information for 1305; it is probable that the general tendency was for the Abbey to deal thus with its reserve, especially in the more distant villages.

Many tenants, however, are recorded as either holding part of their land *ad censam*, from another tenant, or as having granted part of it similarly, or as having created *censuarii*.

The position of these *censuarii* is worthy of careful consideration. Although the lord could not introduce new

conditions of tenure, it was possible for the tenant to 'sublet', and this is what was done in many cases at Beuvrequen, so that it is, at first, in what we may term the second stratum of rural society that some modification of the rule of custom appears.

We must notice that in the first place the re-letting may introduce little change: there are instances of the tenant creating a *cense* which is termed perpetual. Thus Willelmus le Clers holds land from Johanne Pagan, 'and the latter and his predecessors paid us the dues, and now the said William pays instead, and also pays the aforesaid Johanne 8/- annually for life'.

But often the *cense* which is created is for one, two, or three lives, and is to that extent a modification of custom. The gain to the direct tenant by the new arrangement is often considerable; thus *Ricardus filius Margarete* holds  $8\frac{1}{2}$  measures and owes 5 measures of wheat; he has given this *ad censam* for 7 measures of wheat of which he receives two. If the new holder dies or in any other way the tenancy *ad censam* is ended, the Abbey receives double relevatio. The general rule in the thirty-odd cases where land is regranted *ad censam* is that the Abbey has the customary payments at sale and succession, the *relevatio et venditiones*.

Sometimes the new arrangement is described as made *cum consensu nostro*, but it is unlikely that the Abbey had complete cognizance and control of all the intricate arrangements which were made as between tenant and tenant; often, indeed, the Terrier includes directions as to inquiry which show that the thread of succession and interchange had not been followed in the books of the lord.

The chief preoccupation of those of St. Bertin is lest the creation by their hereditary tenants of *censuarii* should lead to the ultimate loss of the rents due to the Abbey. Thus there was the risk that the tenant might let the least profitable part of his holding and make it responsible for the major portion of his payments. The case of Christianus Winkepau is prominent in the Terrier. The Abbey representative is to note that what is contained in the inventory concerning the said Christianus is not *bene securum*, because he has given

*ad censam* several of his pieces of land without consent of St. Bertin, 'and this may turn to our prejudice, as he has kept the good land and burdened the rest with part of his rent'. Of the 44 journals for which he is held responsible he has kept 17 only, and the remainder has been passed on to his two sisters, to Baldwin le Vrient, and to John de Henbuge.

Baldwin le Vrient possesses also a certain measure of land which he has sublet for one polquin per annum. It is stipulated that if the heir of Baldwin should refuse to take the obligation which Baldwin had accepted towards Christianus, then the said polquin should be paid annually to St. Bertin.

Of the leases for terms of years which became common later in the century we find here no instance. The so-called sale of the *curtis* of Wizernes in 1288<sup>1</sup> is in reality a bail or lease for life; it appears to make such provision for subletting, however, as points to the existence of bails for short periods.

Its terms are interesting as being, except for the references to subletting, much the same as those of the later bails for terms of years.

The agreement is between the Abbey and Hugues de Vienne, clerk of Edmund, Prince of England. The land is to be kept under the same system of cultivation; manure is to be used there and not elsewhere; trees are not to be cut down except for purposes of rebuilding, and others must be planted in place of those withered; the young woods may be cut each six years, and the fallows as often as desired. Hugues takes the corn now growing, and must leave the Abbey in possession of what is there at his death.

He may sublet, but not for periods of longer than three years, and not to the extent of more than one-third of the domain; he may give *ad censam pro denariis vel ad mensuram seu ad quantitatem bladi*, or he may let to métayers.

There appears here sufficient indication that contract was slowly coming into existence side by side with and beneath custom in the last quarter of the twelfth century.<sup>2</sup>

<sup>1</sup> G. C. 1288.

<sup>2</sup> Cf. *C. de Val-Benoît*, Appendices, p. 766 onwards, for a list of bails (nearly 100) all of 12 years, between 1350 and 1367.

## CHAPTER VI

### STATUS

#### PART I

##### STATUS IN GENERAL

OUR examination of the Terrier of Beuvrequen has given us a not inconsiderable amount of information concerning the inhabitants of the Artesian villages of the end of the thirteenth century. The picture is not complete in all details, but we see them as small proprietors paying certain rents, fixed largely by custom; free to buy and sell their land; free to leave the holdings of which they were, under certain definite conditions, in hereditary possession. And we have been able to gain this knowledge without reference to any nomenclature describing the status of those whose land and rents are recorded. Now the only document, bearing on these villages, of earlier date, which can be compared with the Terrier is the Breviatio of 850, and there, as we have seen, the words *servus*, *mancipium*, *ingenuus*, &c.—that is, words describing status—were prominent in the record. It was impossible, in dealing with the ninth-century village, to leave entirely on one side the question of status: but at the end of the thirteenth century we have been able to describe a large part of the material life of the peasant without once referring to this question.

This contrast between the Breviatio and the Terrier is of great significance, and in drawing it we are stating one great difference between rural life in Artois in the ninth and thirteenth centuries.

It might appear, at first sight, not of great importance to emphasize the existence of this contrast between communities whose existence is separated by a period of four centuries: great changes in so long a period of time might be supposed inevitable. This view would be supported, for instance, by a comparison between the England of 1750 and that of 1850. But if we look forward from 1300 to the middle of the eighteenth century in France, we shall find comparatively little change. As these villages were in the first half of the

fourteenth century, so they continued to exist down to the Revolution, and the changes of 1789-93 were greater than those of the previous four centuries. It is for this reason that the method of description employed in the Terrier of Beuvrequen is of such great importance.

In the Breviatio a mansus is held by a certain servus or ingenuus; in the Terrier it is held by A., son of B., and it is now our task to examine such evidence as survives of the slow progress of this change.

That the rural system of 850 underwent no sudden change in the ninth century is amply shown by the evidence of the Cartulary of Foulquin; in the succeeding century a thick darkness covers the life of these villages. We know that from 900 to 950 the Counts of Flanders installed themselves as abbots or ruled through their creatures; the anarchy which was to settle down into feudalism was at its height. Even for so important a centre of population as St. Omer had already become, there is little clear evidence for a period of more than 120 years (900-1127).<sup>1</sup>

We see glimpses of war, public and private, famine, pestilence, pillage,<sup>2</sup> and behind the veil we must divine the slow working out of changes which were to continue the breaking down of the system of status we have seen in 850.

In this time it is probable that the distinctions between *servus*, *ingenuus*, *mancipium* disappeared, and there was a levelling both down and up; the eleventh and twelfth centuries are in this region, as in the rest of France, those in which the peasant is in a condition of serfdom.

<sup>1</sup> See Giry, *Histoire de St. Omer*, and Guérard's *Introduction to Chart. Sith.*

<sup>2</sup> For the possibilities of famine in this age see *Hermani Liber de Restauratione S. Martini Tornacensis*, in Pertz, *Mon. Germ. Script.* xiv, p. 307: 'Eodem anno victualium penuria famis atrocitas totam provinciam vehementer afflixit et abbas omnibus pauperibus ad se confugientibus quicquid habere poterat misericorditer tribuere cepit ita ut nec in horreo nec in cellario aliquid manserit . . . Siligo etiam omnino deerat . . . sola avena eis molebatur . . . nec cribro nec tamisio farina purgabatur sed statim aqua calida superfusa panis exinde fiebat,' etc.; and for pestilence, *Chart. Sith.* ii. 1. iv: 'ac subita peste multam partem nostrorum letho tenus percutit. Nec erat tunc ulla morientium requies sed diutius corruebant velud moribide oves,' &c.

And in that age in which serfdom was predominant, those forces were already in action which were to cause radical changes in that system. These forces, as we shall see, were almost entirely of an economic nature.

#### Terminology after 900.

As evidence becomes increasingly plentiful from the middle of the eleventh century, we find the terms familiar to students of the ninth-century cartularies replaced by more general ones. The distinction between *liberi* and *servi* is seldom drawn; that made in the donation of a third part of the villa of Ostresle in 1087 is perhaps the latest in the St. Bertin documents.<sup>1</sup> The isolated mention of *mancipia* in the record of the transference of Merke in 934 serves to remind us that the system of the ninth century was disappearing gradually in the tenth.<sup>2</sup> We get the general impression that in the eleventh and twelfth centuries the bulk of the village population was composed of *servi*, and distinctions between *servi* and *ingenui* are unnecessary because of the levelling process to which we have referred. As time goes on, such general terms as 'submanentes' and 'homines' become increasingly common;<sup>2</sup> they are those 'levant' and 'couchant' under the lord, those governed by the customs of the domain, recorded because they hold land in it, and, generally speaking, not because of any personal relation between them and the owner of the domain.

A term not used in the description of these villages in 850, that of *hospites*, gradually takes its place side by side with that of *servus*, and this appearance represents a change which powerfully affected the position of the servile class, and indeed, of the whole non-noble rural population.

#### Personal Slavery after 900.

That the Polyptyques of the ninth century were from time to time renewed even during the troubled times of the

<sup>1</sup> *Chart. Sith.* Pars sec. I. xxviii, and Pars prima II. lxxvi.

<sup>2</sup> Cf. *G. C.* i. no. 115 (1125): 'quicquid ibidem habebat in terra et super terram cum 3 summanentibus.'

tenth century is quite probable;<sup>1</sup> the fact that they have in no case survived precludes any attempt at a quantitative classification of the rural population during this period. Domestic slaves probably continued to form part of the population of the villa; to this class belonged the host of dependents who were employed about a feudal château or about an abbey such as that of St. Bertin. That they were, as a rule, paid servants in the second half of the thirteenth century in this region is true; the steps of the transition from a state of semi-slavery to this latter condition of greater freedom and less security can hardly be traced. Such general terms as *familia*, employed in the grants of privileges in this age, are of no help here.<sup>2</sup>

The forces which operated to bring about the change were those which were acting generally in the region to change the condition of the rural classes; the chief of them was the lack of human labour for tillage. It is important here, as it is in treating generally of status, to remember that material well-being in the Middle Ages may not improve with change in social or political condition.

#### Serfdom, 900-1300.

For the first two hundred years of this period 'serfdom' will sufficiently describe both the material and social condition of the Artesian peasant; at the end of the period the bulk of the population can no longer be described as serfs, and, what is more important, it will, for the later period, be necessary to use two sets of terms to describe the same individual. The last sentence describes, in brief, the slow revolution which has taken place; the status of the rural dweller has no connexion with his position as a land-holder. It was not, perhaps, so universally true in the ninth century, as has been laid down, that the servile mansus implied a serf as cultivator; but in 1300 a distinct cleavage has taken place between the relation of lord to dependents as tillers of a portion of his land, and to dependents as occupying a definite personal

<sup>1</sup> The first part of the *Chart. Sith.* was written by Foulquin in 961.

<sup>2</sup> e.g. *Chart. Sith.* Pars sec. I. xii (1057): 'in arvis, campis, pratis, pascuis, silvis . . . villis, ecclesiis, comitatibus, familiis, vineis, pomeriis,' &c.

relation to him. Serfdom, as it exists in 1300, is personal, and a noble might pay dues for land which represented a former payment exacted from a servile occupant. We may say that the land and the occupant have, to this extent, become separated after having been for several centuries closely bound together. Here, we consider, emerges the great difficulty of describing serfdom in a given region of France at a given moment. Serfdom existed in 1300 and 1100, but a great gulf lies between the meanings of the term at the earlier and the later date. Serfdom in Artois between 900 and 1300 was not an institution without a history; it was subject to constant change from generation to generation and from locality to locality. It is with this caution prominently before us that we must consider such evidence as we have been able to accumulate from the St. Bertin and kindred documents.

We are concerned, in this essay, not with serfdom in France generally, but primarily with the institution as it existed and progressed in the region of St. Omer. It will be useful, however, to state, as a standard of comparison, what may be called the classic description of serfdom which is familiar to students of works on the Middle Ages in France. The serf was, then, a man *casé*—installed on a holding, from which he was not free to depart. Of this holding he could, in practice, become the hereditary possessor. He paid to the lord part of his produce and gave, too, part of his labour in the form of *corvées*. A personal tax, or *chevage*, was the essential mark of his personal dependence. He was not free to marry outside the limits of the domain, and within those limits not without a payment which testified to his position as a chattel. He was the absolute property of his lord, and as such could be bought, sold, exchanged, or bequeathed. In the words of D'Avenel, 'Society in the twelfth century accepted that commerce in human life which it refused to allow in money'. In fine, the serf was a man *taillable et corvéable à miséricorde*, and his condition was wretched in the extreme.

We may now see how far the evidence for this region is in

keeping with this definition or description. It must be said, in the first place, that the references to serfdom in the St. Bertin documents and the cartularies of the other abbeys of this part of France, are very scanty. The lists of serfs, which were doubtless made out and renewed from time to time during these centuries, no longer survive, and it is chiefly from isolated references that we learn that the status of the peasant passed through the same stages as in other parts of France. It was, we believe, rather as regards the rate of that progress that distinction must be made. Serfdom, as judged from the standard given above, early disappeared, or was profoundly modified, in this part of France.

And first, as to the personal payments which were the mark of the servile state.

In 1091 we are given some details of a family eleven in number. They and their posterity are of servile condition, *de servili conditione et de ancillatu*; they all pay to St. Bertin the annual capitatio; five shillings is to be paid at the marriage or death of any one of them.<sup>1</sup> In 1107, Manasses, Count of Guînes, gives to the Abbey two sisters, Hadwifh and Fredesmund, daughters of Lancive. They, and their successors, are to pay to the Count three obols yearly; at marriage twelve nummi and at death similarly. Here the Count, although bestowing these serfs on the Abbey, apparently retains part of the payment due from them.<sup>2</sup>

<sup>1</sup> G. C. i. 84 (1091): (Volwif, her two daughters, her eight grandchildren) 'qui omnes S. B. capitaneum censum annuatim reddentes ad eundem Sanctum pertinebant ea conditione ut dum aliquis (*sic*) eorum maritaverit v solidos S. B. persolvat et v quum obierit et unum nummum annuatim in depositione ejusdem Sancti'.

<sup>2</sup> G. C. i. no. 107: 'tam eas quam quicquid juris ex eisdem habere consueveram . . . ea conditione ut tam ipse prenominate 2 muliercule quam omnis posteritas earum omni anno in Nativitate Sancte Marie pro capitaneo censu quamdiu vixerint, preposito de Archas . . . 3 obolos persolvant . . . et dum quilibet ex ipsis nupserit xii nummos et in obitu singulorum (*sic*) xii,' &c.

See also G. C. ii. no. 115 (1216), for condemnation of Thierry de Beveren to restore serfs to St. B.: 'homines qui a Bela de L. descenderant . . . Praefatus Theodericus respondit homines illos sui juris esse et se xl annis et amplius eosdem ut servos et ancillas pacifice possedisse.'

G. C. ii. no. 118 (1226) and G. C. i. 150 (1125).

G. C. ii. no. 312 (1230): 'super quadam progenie scilicet Edelina de Rosebeke, Ogiva, et Sara et earum progenie questio verteretur.'

The serf is not free to quit the domain, which is valueless without his presence. Already, earlier in the twelfth century, we have a glimpse of the fact that exceptions to this rule were not unknown. In 1124 the Count of Guînes allows certain men of Écalles who owe him corvées at his castle to commute their payments by paying 3s. 4d. each year. The grant continues to the effect that the land, from the tenants of which this service is expected, is divided into thirty portions. If it should happen that any one of these tenants is obliged to depart (*paupertate cogente*), the remaining men, if they continue to cultivate the land, must make the payment in his place. Here we have the necessary accompaniment of freedom to leave the domain, i.e. forfeiture of the holding; freedom of this kind was not an unmixed blessing.

So late as 1241 the Abbey arranges with neighbouring seigneurs concerning the emigration of serfs from Poperinghe. The men of Poperinghe who wish to go to Suinland must notify their intention before the *praepositus*, the bailiff, and all the 'law' of the village; it must be announced also in church *coram populo*. Neither St. Bertin nor the other parties to the agreement can receive emigrants until assured that these formalities have been complied with.<sup>1</sup> Whether the sanction of such emigration was by way of exchange does not appear. We should say, however, that in 1241, such an arrangement was meant to regularize as far as possible a process that had long been going on.

At an earlier time, the serf did not escape from his lord's control when he had quitted the domain: thus in 1056 a grant

*C. de Licques*, iv (1144): 'Ipse quoque Hainfridus et Ermengardis sese et sua omnia ecclesie S. A. dederunt'; *Duchesne*, p. 35 (eleventh century) for ancillae at Bredenarde near Guînes.

Giry, *St. Omer*, P. Justif., p. 273, no. 3: 'omnes qui infra murum S. A. habitant et deinceps sunt habitaturi liberos a cavagio hoc est capitali censu et de advocacione constituo' (*Charter of 1127*).

Guimann, *Parr. Sanct. Salvatoris*: 'Villicatio quoque eorum qui debent v solidos in morte et in matrimoniis'; and especially the section *De generali placito*, p. 256.

<sup>1</sup> G. C. iii. no. 4 (1241), cf. ii. no. 40: William Chatelain of St. O. authorizes serfs and manants of his avoerie to live in Arques and Poperinghe.

And see Guimann, p. 103: 'quidquid de habitatoribus vel per decessionem vel per venditiones vel per transmutationem seu divisionem.'

of Count Baldwin of Flanders deals with the case of those *submanentes* and *servientes* of the Abbey who are living in the town of St. Omer. They are allowed to dwell freely there on payment by the Abbot of the nominal payment of one measure of corn per annum, unless they come before the law on certain charges.<sup>1</sup>

The characteristics of mediaeval serfdom point to its dual origin: it was the result of two tendencies—one which depressed free peasants, and another which raised a class of slaves.

It is when we attempt to fix the level which resulted from the action of these streams that we meet the greatest difficulties. How far was it above slavery or below freedom? It is probably safer, on the whole, to deny the existence of any permanent level than to describe one which existed at a given moment and infer that it held good during centuries. There was in all likelihood no permanence from the ninth century onwards, and the danger of the classic or standard descriptions is that they imply always some state which was permanent and uniform.

And nowhere, we consider, is this danger greater than in that part of the standard description which states that the serf could be bought and sold, could be given, or bequeathed, or enfranchised. What we may term the extreme view is that the serf, given or sold, was in the same position exactly as the modern tenant-farmer who changes masters. He has paid his rent to one; he now pays it to another. This view has been ridiculed; it is not the whole truth, but contains at least part of the truth for which we are seeking. Certainly it is as a cultivator of the ground that the mediaeval peasant is of importance to his master. The man transferred with his land paid his dues now to another owner. He did not escape from the economic milieu in which he lived. He was under greater or less restriction as regards quitting his land, &c.

But as the slave had become the serf installed on a holding, and as free peasants had become more or less bound to the soil they cultivated, so another dual aspect becomes visible.

<sup>1</sup> *Chart. Sith.* Pars sec. I. xiv.

Under the action of the economic forces which produced far-reaching changes in the twelfth and thirteenth centuries, there came the separation between two relations, namely that existing between the lord and his slave who had been provided with a *casa*, and that between the dominus and the man installed on a portion of the domain. It is not easy to separate the two relations in theory, but they do become distinct in course of time; it is the second which is represented by the payments which we have found collected by the official of St. Bertin at Beuvrequen at the end of the thirteenth century; it is the former which is predominant in many of the transactions in 'serfs' to which the terms, gift, bequest, or sale, have been applied. The payments at marriage, death, and the annual ones are taken as outward and visible signs of serfdom; but ownership which has arrived at this phase of periodic recognition is far from being real ownership; it becomes, in practice, the liability to that payment and no more. And to correspond to this separation of relationships the system grew up of keeping two sets of records. In one, the personal payments of the serf are entered: it is the book of the *avoerie*; we have seen an example of the other in the Terrier of Beuvrequen. So, in the twelfth and thirteenth centuries, the serf transferred from one master to another may occupy land belonging to neither of them; he passes from one *avoerie* to another and makes the same payments. We consider that all donations of serfs should be examined in the light of these two relations in which the peasant may stand to his master. A gift need not mean bodily transfer of the servile family affected. Even the partition of the children of the serfs which Guérard examines for the Polyptyque d'Irminon will bear this interpretation. It is a long way from this to the state of the negro slave who was sold 'down river' in the Southern States in 1850 or thereabouts.

The description, then, of the serf as a slave installed on a holding is far from complete; that is, if the description is to hold good for any long period of the earlier Middle Ages in this region of France.

All the transactions in land or serfs to be found in the

St. Bertin records either transfer the tenant with the land (and at certain epochs we do not pretend that the land would have been of the same value without the occupant) or they have to do with the transference from one *avoerie* to another. In the latter case, it was rather a piece of book-keeping which was required than any removal of the serf.

We have now to consider some of the causes which influenced profoundly the life of the lower rural classes in Artois in this period, remembering always that the peasant was affected by them in both the relationships which we have endeavoured to distinguish.

The chief of the forces which altered the condition of this peasantry in the eleventh, twelfth, and thirteenth centuries was an economic one—the lack of labour for cultivation.<sup>1</sup>

### *The Défrichements and the Hospites.*

These centuries were characterized by a new impulse towards bringing more land under cultivation. The donations made to the new religious foundations which were established in this age were largely in the nature of new territory to be exploited. The wealth with which the monks were endowed was to be won from the soil of the areas handed over to them. The lists of lands and forests which we find in the grants of the time give a false impression of abundance, and we are led to imagine a rich abbey, and monks who had little to do except to administer, and to receive rents. But the thousands of acres of forest and marsh were of little value as they stood; and many generations of patient labour were necessary for them to become fruitful. It is for this reason that we find the members of a foundation which has been thus endowed complaining of the poverty and hardship of their lot.<sup>2</sup>

This was true of many parts of France; most particularly in Northern Artois and the portion of Flanders which marched with it: and this land, as a habitable and cultivated area, owed its existence largely to the work of the abbeys which were founded in the eleventh and twelfth centuries.

<sup>1</sup> Cf. D'Avenel, ii. 1. 168 and 175.

<sup>2</sup> For a striking example see *C. de l'Abbaye d'Orval*, Introduction, iv.

We are told by Lambert of Ardres that at the end of the tenth century the land round Guînes was waste and desolate.<sup>1</sup> When the Abbey of Andres was founded in 1084 the first inhabitants must have had before them to the north-east the great waste of waters which lay behind the dunes on which stood Calais, and stretched far inland beyond St. Omer. In the first half of the next century the nuns of Clairmarais established themselves in the watery region to the north of St. Omer, and it was their task during the next century to drain the marshes by which they were surrounded. How far this work of reclamation was applied to regions never before cultivated, and how far to land which had relapsed into its primitive state during the troubles of the ninth century, it is impossible to say. Constant care was necessary to preserve what had been gained on the sea or from the gulf which represented then the river Aa ; and the region of the Boulonnais had the characteristic of relapsing easily into woodland. Certain it is, that in many of the St. Bertin villages, including some which appear in the Breviatio, we see the existence of a portion which was uncultivated, and the recorded transactions of the age make allowance for the bringing into cultivation of such land. Perhaps we may connect with this excess of land over the population available to till it, the vagueness with which lands are sometimes transferred without specification of area or exact situation in the earlier charters of the district.

It was the task of dealing with such an area as this, which lay before the seigneurs and religious houses of Northern Artois.<sup>2</sup>

It was in the eleventh and twelfth centuries that the Counts of Flanders added to their territory by the construction of dykes by which the Aa was brought into a comparatively narrow channel, though hundreds of years later the land lying between the road to Calais from St. Omer and that to Watten was still largely under water, and it was not until 1623 that the famous marshes of the Moères were drained. But

<sup>1</sup> Duchesne, A. D. 928.

<sup>2</sup> For a list of the religious houses of the region see *G. C. v.* 419, and a very full list in *Chron. Comtes de Hainault*, MCCCCLXI (1425). Licques was founded c. 1090, St. Léonard de Guînes 1120, Beaulieu 1131, Ardres (Chapitre) 1069, given to the Abbey of Andres in 1144.

although the work, after the first impulse, seemed to be checked for centuries, there is sufficient evidence of great activity and constant struggle. In 1180 we find Alexander III charging the Bishop of the Morini to consecrate a church recently constructed in a place which had formerly been watery and uninhabitable, but was now drained.<sup>1</sup> In 1171 Robert, the *praepositus* of St. Omer and Aire, drains a marsh within the parish of Bourbourg (at this epoch, a fishing village) and renders it suitable for the plough. He proceeds, notwithstanding the protest of St. Bertin, to distribute it in *mansiones et funiculi* to coloni.<sup>2</sup> At Bourbourg we have evidence that drifting sand allowed no intermission of effort.<sup>3</sup> In every village, too, we find disputes concerning the *novalis* or tithes on newly reclaimed land. Canals were dug to convey the surplus water and to provide easy means of communication; one at Poperinghe comes into prominence in 1187; another was constructed at Bourbourg in 1276; another at Beuvrequen in 1220, and so on.<sup>4</sup>

For the reclamation of the waste lying between two neighbouring villages, associations of two neighbouring seigneurs were formed; hence the *societarii*, for the division of whose responsibilities arrangements were made which we find recorded in the Grand Cartulaire.<sup>5</sup>

<sup>1</sup> G. C. i. no. 296 (1180): 'in loco aquoso et inhabitabili'; 'nunc vero palude siccata habitatores loci indigent ut constructa ecclesia dedicetur.'

<sup>2</sup> 'Item sepenominatus Robertus, infra terminos parrochie nostre Broburgensis, quandam paludem, ingenio suo et comitis expensis, ad terram deduxit arabilem; et in ea, nobis reclamantibus quod contra statuta erat canonum, basilicam fundans, mansiones et funiculos possessionum colonis distribuit, decimis nostris de eadem palude usurpatis et violenter detentis.' (*Chart. Sith.* III. xvi.)

<sup>3</sup> G. C. i. no. 210 (1159): 'quandam terram quam berguariam vocant . . . ex nimio flatu ventorum quandam predictae terrae partem discurrentes harene cooperuerunt.'

<sup>4</sup> G. C. i. 332<sup>b</sup> (1187),

i. 397 (1197),

ii. 212 (1223),

v. 8 (1336), and many others.

ii. 169 (1224) Beuvrequen: 'et gotam suam vel canale per terram meam libere habeat.'

There was a constant struggle at Beuvrequen against flooding: it was inundated during the Revolution. (*Dict. Hist. P.-de-C.*).

<sup>5</sup> e.g. i. 470 (1181): 'Quod cum quedam terra sterilis et inculta que vulgo dicitur wastina in parrochia de Cuhem'; and i. no. 337: 'cum

The manual labour required for these enterprises was, we are told, performed by bands of peasants—the mobile labour of the time. How far this was so in Artois we are unable to say. That agricultural labour was to a certain extent mobile in the twelfth century is clear from the Arras Cartulary, where we find stated for many villages the amount of tax to be paid by the harvester, whether man or woman, coming from without the domain to help in the work of the season.<sup>1</sup> But the chief means at the disposal of the seigneur who wished to increase the extent of his domain and revenue, was to offer favourable conditions to those willing to settle on his land and help in the task of bringing it under cultivation. Flight was practically the only form which the protest of the serf against oppression could take;<sup>2</sup> and restriction and agreement among masters would in the long run be powerless as against the attractions which were held out. The Canada of the Artesian peasant lay at this period close at hand; he was offered a holding, often under the condition of building a house on it. It is in this direction that an outlet was found for the increase of population, which was probably rapid in this age.

With this new activity we connect the appearance in the eleventh and twelfth centuries of the class of tenants known as *hospites*. They are first mentioned by name, perhaps, in this region in the description of the donations made towards the end of the eleventh century (1084) by the Count of Guînes to the newly founded Abbey of Andres. During the next two centuries the name is of very frequent occurrence, and it is significant that it is of much more frequent occurrence for the villages of the Abbey of Licques than for those of the much older Abbey of St. Bertin.

The inhabitants of the scores of villages described in the

vero terra ab antiquo quia deserta remansisset indivisa'; also i. no. 186 (1146), and *C. de Licques*, xiii (1178) for *défrichements*.

For further details as to reclaimed land see *G. C.* ii. 324 (Loon and Gravelines); *C. de Bergues St. Winoc*, 60, 61 (1067) and under date 1198; *C. de St. Nicholas de Furnes*, p. 71; and *Guiman*, p. 297 (1106): 'villas . . . a cultoribus destitutas et in solitudinem reductas.'

<sup>1</sup> *C. de Guiman*, p. 299, Dainville, &c.: 'et de denariis qui pro facillagio dantur a messoribus tam indigenis quam advenis masculini sexus.'

<sup>2</sup> Cf. D'Avenel, ii. 1. 175.

twelfth-century Cartulary of Guimann are invariably described as *hospites*, and the same is true of those who inhabit houses belonging to St. Vaast in Arras itself. It is true that this abbey of southern Artois was of old date, but we are inclined to believe that the Norman invasions had been much more lasting in their effect here than in northern Artois; in several cases the Cartulary shows that the older villa had been replaced by a new centre of population situated at some distance from it.<sup>1</sup> We do not know what proportion of the rural inhabitants the hospites formed at any given date. We have, indeed, no clear picture of them dwelling side by side with serfs on the same domain, as we saw the *ingenui* and *servi* doing in 850. We can only state that *ancillae* and *servi* are spoken of in the same neighbourhood about the same time with the hospites.

Further, the conditions on which the hospites held their land can only be stated in general terms as being more favourable. The fact that the distinction is generally made between the hospites and *submanentes* is itself of considerable importance. Again, it is not necessary to assume that this distinction remained always rigid; it probably varied from place to place and time to time; and there may have been a certain amount of levelling up and down, as had been the case earlier with free and unfree dwellers on the villa.

We find the transference of hospites with their land recorded in the same terms as those used for serfs; and instances of the gift or bequest of hospites are not uncommon. As late as 1274 the sale of two hospites is recorded, and in 1248 we find a man 'giving tithes of all he possesses, including hospites and *submanentes*. The class survives, at least in name, well into the fourteenth century.

We have already referred to the part played by the hospites in the disintegration of the villa. They took their place in the economic system of the domain, but were not subject to the personal payments due from the serf. This new element in the rural population must have been recruited in the first

<sup>1</sup> Cf. under Villa Servin, *C. de Guiman*, 396-7: 'ubi videlicet ipsa villa Servin antiquitus fuit.'

instance chiefly from the ranks of serfdom, and to that extent lessened their numbers. Further, the existence of hospites could not fail to react favourably on the condition of their fellow dependents, and this would become the more true as the distance between them became smaller. We have often referred to the importance in this disturbed region of any factor which tended to make domanial book-keeping more difficult. The existence of the class of hospites would tend to do this, and this difficulty would increase, in course of time, with intermarriage.<sup>1</sup>

### *The Communes.*

It is usual to ascribe to the establishment of the Communes a certain influence on the fortunes of the peasantry in the neighbouring villages. It is difficult, however, to proceed from the general statement to detailed particulars; at all events, this is true in the case of the Communes of Flanders. The first charter or *Keure* to the Commune of St. Omer was granted in April 1127 by William Clito, one of the seven claimants to the Countship of Flanders, who made his 'joyous entrance' into the town after the assassination of Charles the Good, at Bruges, in the preceding month. From that time

<sup>1</sup> For the Hospites see practically all the Cartularies of the region, e.g. *G. C.*

i. no. 128 (1119): 'et de summanentibus sive hospitibus quos S. B. habet in predicta castellaria.'

i. 193 (1151),

i. 168 (1138),

i. 227 (1165),

and iii. 352 (1282), hospites at Watten.

1278, sale of 2 hospites at Cozecque.

1248, 'de decima terrarum, animalibus, submanentibus et hospitibus.'

iv. 422 (1290).

*The Register for Quelmes*, no. 16 (1279).

*C. de Théroutanne*, no. 17 (1136), 196 (1246), and a charter of 1157: 18 villages with hospites.

*C. de Samer*, ii (1112), &c.

*C. de Chocques*, P. T. 1120.

*Petit Cartulaire du Chapitre de St. O.*, p. 35 (1251).

Duchesne, p. 27, &c.

*Guiman*, &c.

*C. d'Arras* (1119), no. 12.

See also *C. de Licques*, *St. Winoc*, &c.

until the end of the thirteenth century St. Omer grew in population, prosperity, and importance. The right of *bourgeoisie* was acquired by birth or by habitation in the town for a certain period. The duration of this at St. Omer is not known; at Arras it was one year and one day. There would appear to be here an obvious refuge for the country dweller who was oppressed. But flight meant loss of land and house, and there is no sign that the citizens would welcome such immigrants with open arms. The privilege of belonging to the *bourgeoisie* was jealously guarded, and the same was true of the fifty or sixty crafts or trades carried on within the town boundaries. Probably the town represented to the country dweller another authority besides that of the Abbey and the Chapter, by which he might be made to pay for the right of disposing of his produce.

For some time, at least, men of various conditions continued to live side by side in St. Omer. The ninth clause of the first charter declared that all present and future dwellers within the walls of St. Omer should be free from *chevage* or head tax. Those affected by this were, probably, the cultivators of the lands lying close to the town.

A renewal of the Keure, conceded by Philip of Alsace in 1168, contains a clause relating to the method of procedure to be employed by the seigneur who claimed a serf in the town: If a serf is a burgess, he shall not be taken in the town, and if any master wishes to claim him as his, the nearest relations, such as his uncles and maternal aunts, shall be required as witnesses; if this is not done, he shall go free.<sup>1</sup> In 1193 we see the hospites or subsides of the Chapter inhabiting houses in part of St. Omer, under similar conditions to those described in the Cartulary of Guimann for the hospites of St. Vaast at Arras.

### *Industry in the Villages.*

It is probable that the general uncertainty as to status which began to show itself early in the twelfth century was, in part,

<sup>1</sup> See note 1, p. 96, and Giry, *St. Omer*, P. Justif., no. xiv (1168), art. 29.

brought about by the rise of industries in the villages. The speciality of St. Omer was its manufacture of cloth, and very minute regulations were made to ensure that the quality and price should not alter. The strictness of the regulations led, in the long run, to the ruin of the craft. Many weavers migrated from the town and set up their machines in the neighbouring villages, where they placed themselves under the protection of the local seigneur. In 1272 the Count of Guînes gave permission to the weavers of Escalles, a village on the sea coast, to buy their wool, to dye cloth, to weave, &c., throughout the county wheresoever it might please them.

The weavers working under the protection of the Abbey at the village of Arques were notorious offenders, and a famous expedition made in the next century by the burgesses from St. Omer resulted in the destruction of the machines and a quarrel which the disturbance of the Hundred Years' War caused to drag on for a generation. The records mention no other villages besides Escalles and Arques in this connexion, but it is fair to suppose that other villages at this time contained craftsmen of various sorts. It seems probable that their presence played its part in bringing about the transformation in the condition of the peasant which shows itself as almost complete in the early years of the fourteenth century. The *défrichements* and the accompanying settlement of the hospites, the growth of trades in the villages, affected the position of the peasant directly, making his labour of more value by bringing about a lack of equilibrium between population and employment for it. These causes are economic, and they are the most important. The desire of the seigneur to retain his tenants on the domain found its outward expression in acts of *affranchissement*—the formal deed by which the peasant was relieved of the characteristic personal payment which distinguished the serf. Speaking of France generally, we may say that records of such acts are to be found sparingly in the eleventh century, more plentifully in the twelfth, and in abundance in the thirteenth century; as time goes on they tend to affect larger groups of persons, so that whole villages

may benefit by them. It has been maintained that in no Cartulary are such records wanting, but from the Grand Cartulaire they are conspicuously absent. It was not, as we have seen, that there were no serfs to emancipate—a fact all the more remarkable because the motive generally imputed to himself by the donor of charters of *affranchissement* was a pious one, and we should expect to find at least some examples preserved in the documents of St. Bertin or of the neighbouring abbeys.

It is interesting to compare, in this respect, the Cartulary of St. Trond with that of St. Bertin.

The history of the former abbey resembles, in many respects, that of St. Bertin—there is the same record of quarrels with the town which had sprung up round the abbey, of quarrels over tithes, &c. But in the St. Trond Cartulary we find perhaps fifty documents bearing on serfdom, and many of these are records of whole or partial *affranchissement*. We are unable to account for the difference, and cannot even venture to say that there *must* have been formal *affranchissements* in the St. Omer district apart from those which were brought about by stress of circumstances.<sup>1</sup>

The means of escape from serfdom which was offered to

<sup>1</sup> Experience shows that it is unwise to make general statements for a wide area in the matter of serfdom: hence the above section is supported almost entirely by references to St. Bertin documents and those of neighbouring abbeys. The documents of the region further east are very valuable for comparison: see e.g. *C. de St. Hubert*, ccclxxxvi and ccxciv, cccxcvi, for *affranchissement*: also ccclxxxiv (1324) for a gift of servi and children to the abbey.

Also *St. Lambert de Liège*, vii, for emancipation of 3 serfs: 'secundum legem salidam denarium de manu episcopi excussimus et sic ea a servitutis vinculo liberavimus.'

*Chron. des C. de Hainaut*, ccclxxx (1360) for mention of priest of servile origin.

The *C. de St. Trond* is especially valuable. In 47 charters from 1072 to 1270 will be found illustrated the whole system of serfdom. There are many instances of voluntary surrender into serfdom: e.g. x. (1055): 'Ego Imera genere ingenua . . . Posterius mei uxores de familia ecclesie accipiant . . . qui alienas ducere voluerint ab abbate licentiam obtineant': xxiii (1108) shows a wife who 'liberis orta natalibus' becomes serva so as to be of the same land as her husband. Cf. also lx (1152), lrv, lxxiii; cix (1186) shows certificate of serfdom given to those oppressed by other domini; cxix. the renewal of a charter of *affranchissement* destroyed by fire; and so on.

the serf by taking orders is well known. There are isolated instances of it in this region.

Another cause which led to a rapid decrease in the ranks of serfdom was intermarriage between servile and non-servile. The working of this cause will be clearly seen from consideration of the list of serfs in the Beuvrequen district in 1305. This we now propose to analyse.

## CHAPTER VII

### STATUS

#### PART II

#### THE AVOERIE OF BEUVREQUEN IN A.D. 1305

IN the Terrier of Beuvrequen we find at the end of nine of the sections the words *de avoerie est (sunt)*. The number of families thus described is eight, and the total number of persons affected, thirteen. We have found, from various references in the twelfth and thirteenth centuries, that the phrase is used to describe those who are in a state of serfdom; who are liable to those personal payments which are generally taken as characteristic of serfdom.<sup>1</sup> Fortunately, the volume of the St. Bertin records inscribed 'Beuvrequen, 1411-90' contains, immediately following on the Terrier of 1305, twenty pages which are headed 'Avoerie'. They give a list of the persons who, in the year 1305, were still serfs of the Abbey, though it is to be noted that the word *servus* is nowhere employed and is indeed uncommon in the records of this region in the thirteenth century.

The introductory paragraph begins as follows :

'Here you will find all those who now are of the Avoerie and their children who are, or who will be, of it, and you will note that whoever of them is born of a free father and a mother of the Avoerie is of the Avoerie. The converse is not true, because those born of a father of the Avoerie and a free mother escape our Avoerie and become free.'<sup>2</sup>

<sup>1</sup> See G. C. i. no. 380 (1194): 'quod quicumque servus meus vel de advocacione mea existens,' &c.; and iii. no. 411: aquis, avoeris, &c.

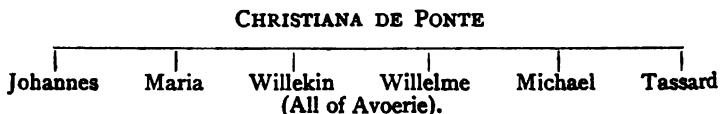
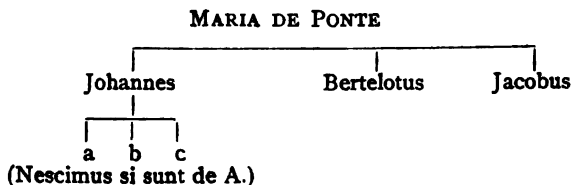
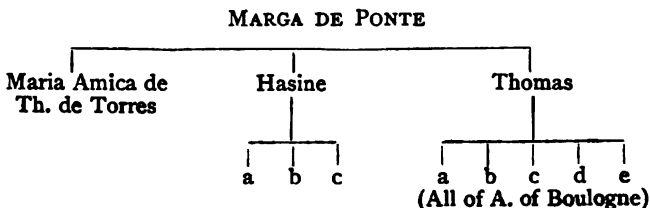
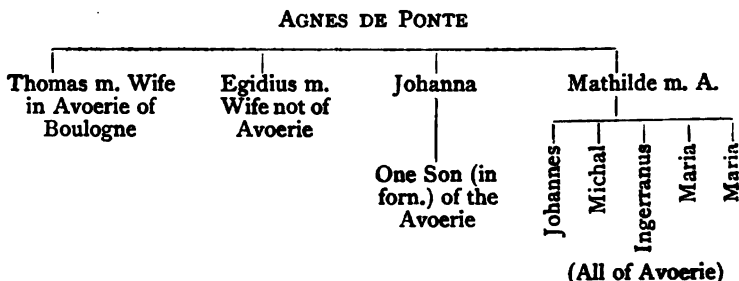
<sup>2</sup> 'Inventarium de progeniebus illorum qui sunt de avoeria nostra ad domum de B. pertinente: Hic invenies universos existentes nunc de avoeria nostra et eorum pueros qui in futuro erunt de avoeria: et notabis quod quicumque istorum natus est ex patre franco et Matre de avoeria est de avoeria; et non e converso quia natus ex patre de avoeria et franca matre evasit avoeriam nostram et efficitur francus. Item habens Matrem et patrem seu unum ipsorum vel neutrum ipsorum, nihil nobis debet ratione avoerie nisi maritetur, moriatur, aut in fornicatione sit vel adulterio.'

We have here a clear statement of one means by which the serf could not indeed cast off his own status—that was permanent—but could enable his children to begin life as of free status.<sup>1</sup>

The list which follows the preamble contains sixty-seven paragraphs, and the most cursory reading of them reveals at once the fact that mixed marriages, which would give this escape to the offspring of the union, are numerous. There are few families here described of which one son at least has not married a free woman: there are no instances, we believe, where a relapse into serfdom was made possible by the marriage of a 'francus' with a member of the Avoerie. The total number of persons included in the list can be given only approximately, as will be seen shortly. One of the most striking features of the record is its extreme vagueness. We may place the number between 350 and 500. The total number of marriages which result in definite escape from the Avoerie for the next generation is twenty-six; the number of children affected is not given. The Abbey is not concerned with those who escape in this way: they are merely described as 'franci'. We may safely estimate it as between 80 and 100. A few examples will illustrate both the method employed in drawing up the records of the Avoerie and the confusion as to status which necessarily followed on these marriages. It is important to note that this surviving 'Avoerie' is but one of many which were drawn up and periodically renewed in the early Middle Ages in this region. Thus regarded, it throws great light on the whole history of status in the St. Omer country.

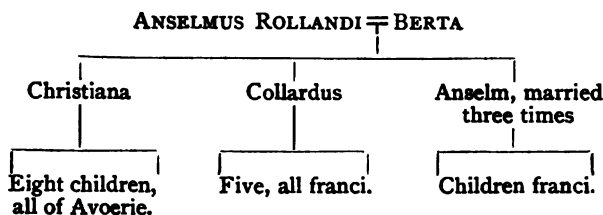
We take first the largest family recorded in these pages; it involves at least forty persons. It deals with the descendants of four sisters, Agnes, Marga, Maria and Christiana de Ponte, who are described as the daughters of Beatrix de Ponte. As in the Terrier 'son of such a man' is generally the key to the tenant's possession of his holding, so here 'daughter of such a woman' is given as the explanation of the fact that the person or family under consideration is in the Avoerie.

<sup>1</sup> The notes to Ch. VI illustrate this.



In the case of the eldest sister, Agnes, the grandchildren by the two sons leave the Avoerie. In one instance they enter that of Boulogne; in the second we are not told whether they become free or enter another Avoerie: the matter does not concern those who make out the list. The child of Johanna by an irregular union remains in the Avoerie, and all the children of the daughter Mathilde take the status of their mother. The grandchildren of the remaining sisters either remain in the Avoerie or are transferred to that of Boulogne.

We take one other instance, that of Anselmus Rollandi and his wife Berta, who are both of servile status:



Here the children are, of course, serfs. The children of the daughter Christiana must remain serfs, and only in the next generation may the children of the boys among them leave the Avoerie. One boy has removed himself from the Avoerie by taking the tonsure *sine licentia nostra*. The son Collard marries a woman who is *franca*, and his children begin a life of free status. Anselm has married three times, each time to a free woman: his descendants are free.

The two families, concerning which we have quoted the information given in the record, will suffice as examples of what the possibilities and results of intermarriage were in 1305.

No fewer than sixteen times do we find such expressions as *nescimus si sunt de avoeria; sed nescimus si pueros habuerunt vel si eorum uxores fuerunt france; pauca scimus de ejus progenie*.

The mere fact of the possibility of such marriages would in itself cause uncertainty, and careful continuous record would be required if the dominus was not to lose part of his revenue. But the uncertainty was intensified by geographical difficulties. The serfs mentioned in this list are described as paying their dues at the domus of Beuvrequen. But, as we have seen, only a few families actually resided on the territory of that village. They are settled in the villages near by—at Wimille, Portel, Marquise, &c.; often the information for one family mentions members residing in several villages. When the distance becomes considerable, as in the case of two brothers who are married and living at Arras, it is plainly hopeless, at this time, to follow up their case; nothing is said at all of their families, though the fathers are both of the Avoerie. It is easy to see

that the hold over these people is slight; it could hardly have long survived the continual migration which was evidently taking place, and, above all, it could not endure under the separation of the two relations in which the lord stood towards the domain, the personal and the territorial.

The preamble, after defining the conditions of birth which governed freedom or otherwise from the Avoerie, goes on to say that, 'He having father or mother or one of these or neither of these owes nothing *ratione avoerie*, unless he marries, dies, *aut in fornicatione sit vel adulterio*.'

The meaning of this is made clear by the language employed in the body of the document.

'Ydonea and Marota, daughters of Marga de le Gate, will be of the Avoerie if they marry.' Beatrix le Castelaine has two sons who are or will be of the Avoerie, and so on. The same applies to irregular unions, of which eighteen are mentioned: the mother is counted in the Avoerie henceforward.

The conditions which governed membership of the Avoerie and the implied servile status are clear. But what of the disabilities which attended this status? They are given clearly in the concluding sentences of the preamble. 'All those of the Avoerie must present themselves (*corpus et personam suam coram nobis representare*) in our House at Beuvrequen, and pay one penny on the day of the Assumption, otherwise they fall under the obligation of paying a fine.'

Also at marriage they owe 5s. and at death 5s. No excuse will be accepted for not coming to Beuvrequen on the Feast of the Assumption 'unless we find it good'.<sup>1</sup>

The economic disability is, then, the payment of 5s. on two occasions and an annual payment of 1d. The nature of the moral disability is, of course, difficult to determine; it would be interesting to know, for instance, how the children who

<sup>1</sup> 'Omnes vero existentes de av. debent corpus et personam suam coram nobis representare in domo de Beuverkem et unum denarium dare in die Assumptionis beate Virginis alioquin incidunt in emendam ad voluntatem nostram. Item maritans debet vs. et moriens debet 5s. Nulla excusatio potest illos de av. excusare erga nos nisi fuerit nobis acceptabilis si defecerit de veniendo ad domum de B. in Ass. beate Virginis.'

were free regarded their cousins who were still of the Avoerie. The stress laid on the compulsory annual visit is important ; it is plain that such visit, if punctually performed, would give the Abbey or other lord the opportunity of establishing a precedent and of checking the list of the Avoerie. The necessity of the threat shows the fear of the non-performance of the duty. We cannot imagine that the journey of, in some cases, many miles, would be performed by a large proportion of these people. We are told, indeed, in the case of Mathilde Turkete, who is married and has children who are of the Avoerie, that her husband is accustomed to shut her up on the Assumption Day so that she may not come to the Hall at Beuvrequen for the annual recognition of her status. Generally speaking, on reading this document we receive an impression of the helplessness of the authorities who are attempting to compile and continue the record in the face of the changing conditions of the time. The question naturally arises here as to how those who were of servile status stood as regards material position to those of their neighbours who, by one means or another, had escaped from the Avoerie. Those registered in the Terrier of Beuvrequen are, without exception, of the humbler class of tenants ; their holdings in no case amount to so much as four acres of land, and they fall into that division which we have described as paying nominal rents. We may note, however, that there are many others at Beuvrequen equally poor in land who are not of the Avoerie.

What proportion of the rural inhabitants of Artois were in 1305 still of servile status we cannot say. So far as we may judge from those documents there were no serfs at Beuvrequen in the portion owned by St. Bertin. Eight of those described as being of the Avoerie come under the heading of Marquise, one under that of Loningahem, four under that of Basinghem. The list of the members of the Avoerie breaks off with an incomplete paragraph, but not before all those described in the Terrier as of the Avoerie have been included. We may safely say, without making the vain attempt to state a proportion as between free and servile, that in 1305, in the villages near Boulogne, there was a large and rapidly increasing

population which was no longer in any other relation to the seigneur than that involved in living on the domain. We may say, further, that a relation of personal dependence had disappeared entirely from among the tenants of St. Bertin at Beuvrequen.<sup>1</sup>

<sup>1</sup> Cf. *C. de N.-D. de Boulogne*, clii (1464): Letters of safeguard to N.-D. by Louis XI: 'Avec leurs serviteurs, familles, hommes et femmes de corps s'aucuns en ont.' There is mention on p. 20, *Acad. de Boul.*, 1885, of the existence of a family of serfs at Outreau, in 1513, who paid a tax yearly and at marriage.

## CHAPTER VIII

### AGRICULTURE, 900-1350

THE study of the records of northern Artois serves merely to confirm the standard accounts of the state of agriculture in the Middle Ages in Western Europe. We find here the features which are generally emphasized; the most striking of them are perhaps the absence of change in method and the lack of variety in crops. The rent lists for Beuvrequen and other villages have shown that by far the most important cereal was oats, and that wheat, barley, and rye were also cultivated; as alternatives we find only peas and beans. Flax was grown in some districts.<sup>1</sup> It may be noted, also, that in spite of extensive *défrichements* a large part of this region was and long continued to be suitable chiefly for stock rearing; once the higher ground to the south of the road from Calais and St. Omer is quitted, we find cheese and butter prominent among the articles paid as rent.<sup>2</sup> Much of the marshy land, we are told, was valued for the fuel to be obtained from it in the form of turf.<sup>3</sup> Of the actual process of cultivation we have little information that is of more than local interest. The 'flottage' or periodic flooding of the meadows lying near the mill-stream is frequently a matter for arrangement among proprietors.<sup>4</sup> Marl continues to be used, and

<sup>1</sup> *G. C.* vi. 226: 'tant aux champs comme es gardins, près, pastes, courtieux comme enclos soient lins, navettes, kenneves, grosses feves, gris pois et autres ablais quelconques.'

<sup>2</sup> *G. C.* (1178), i. 268, for tribute of butter, geese, &c., from Grave-lines; and *C. de Licques*, xii (1176): '3 pensas caseorum et unum butiri.'

<sup>3</sup> *C. de Licques*, xxvii (1223): '30 mes. de marisco ad fodiendum turbas vel ad pasturandum sive ad colligendum fenum.'

<sup>4</sup> *G. C.* v. 165: right to 'faire clorre ou abatre 3 de chiunc ventailles du molin estant a Coyeke pour avoir l'aiseement del yauwe pour faire flotter leur dis preys quant les molins ne maurra'.

Also *G. C.* iii. 437, v. 165, ii. 69, vii. 323; *C. de Théroutanne*, 336 (1446), &c.

careful stipulations are made in leases and sales regarding the employment of the manure from the farm stock.<sup>1</sup>

Within the limits set by the knowledge of the time, the cultivation carried out on what we may call the home-farms was careful and systematic. Their equipment as described for the thirteenth century recalls that recorded in the royal villas of the ninth century.

An agreement between St. Bertin and Eustace de Cuhem, of date 1289,<sup>2</sup> furnishes some details which enable us to add to our picture of Beuvrequen. The said Eustace had taken Beuvrequen *ad censam* at the rate of 312*l.* per annum. He becomes liable for certain rents owed by St. Bertin to the Count of Boulogne and must give hospitality to the Prior for one day and night per annum. The arable must remain arable unless for the good of St. Bertin, and then only with the consent of the *praepositus* of Arques; all improvements are the property of the Abbey. The buildings have been valued *communi consensu* as follows: the old grange is worth 90*l. par.*, and the new one 144*l.*; the new cow-house 68*l. 10s.*, the new stable, situated between the new cow-house and the granary, is valued at 50*l.*, the granary at 13*l. 7s.*, the furnace, dairy, and cook-house at 6*l. 3s.* There is also a new sheepfold of value 80*l.*, and the 'magna domus' and 'logia' of the same are valued at 40*l. 10s.* and 15*l. 10s.* respectively. The gateway walls and masonry, probably surrounding the yard, are not valued.

Of the arable pertaining to the Curtis of Beuvrequen 36 measures bear at the moment corn of value 46*l. 16s.* and 61½ measures are sown with spring corn of value 41*l. 10s.* At the end of the lease they are to be left similarly sown. There follows a list including cows, horses, pigs, carts, harness and cloth to the total value of 63*l.* Sheep are not included in this list, and the total value does not allow for an extensive stock of other kinds.

<sup>1</sup> G. C. ii. no. 211 (1223): 'De stramine quod de coopertura fuerit residuum quod exinde debet fumum facere'; and G. C. iii. 411 (1289), 404, and C. d'Arras, 90 (1198): 'fodere vel stercorare vel marlare.' See also C. de Guiman, passim.

<sup>2</sup> G. C. iii. no. 411.

An almost contemporary sale of the Curtis of Wizernes, 1288 A.D., is recorded in similar terms and with much the same restrictions. There is to be no change in order of crops.<sup>1</sup> Fruit-trees may not be removed, and new ones must replace those which have perished. There are minute instructions as to the cutting down of the small wood every six years, and so on.

### Morcellement.

The question of morcellement is closely connected with that of the system of agriculture. It is not difficult to show that there is at least a strong probability, judging merely from documentary evidence, that tenures were often dispersed in the ninth century in this part of France.<sup>2</sup> We can of course draw no such conclusion with regard to morcellement. Indeed, it is becoming increasingly clear that what we may term 'the curve of morcellement' has changed position and direction more than once in the course of the Middle Ages and modern times. For long regarded as the result of the Revolution, it has been shown to have been very marked on the eve of that event. We see it here in 1305 also very marked, and it is hardly possible to conceive morcellement carried further than we see it in certain of the Dénombrements. It would be

<sup>1</sup> *G. C.* iii. no. 399; and see *G. C.* iv. no. 112: 'et au moins doivent le oir du dit jehan laisser le terre ke fu kerkie à l'entreie de sa chense kerkie ensi ke il le trouva kerkie et le gaschiere ke il trouve laisser en teil estat et en melleur.' This is the usual stipulation in leases.

<sup>2</sup> Arguing from—

- i. The fields at the present day.
- ii. The Plans Cadastraux as they exist in the villages and the Bureau des Perceptions directes at Arras.
- iii. (a) The eighteenth-century lists of 'biens nationaux', e.g. for Poperinghe, Wizernes, &c.
- (b) The eighteenth-century village plans preserved in the Archives Départementales and in the Archives of the Chapter of St. Omer.
- (c) The Atlas des Dîmes of the Chapter of St. Omer: cf. plan, p. 160.
- (d) The tax rôles of the eighteenth century.
- iv. The sixteenth-century vingtième rôles of 1569.
- v. The rapports and dénombrements.
- vi. Terriers, such as that of Beuvrequen.
- vii. Many scattered references of the thirteenth century and twelfth century; e.g. *C. de St. Nicolas de Furnes* (1144 and 1120).
- viii. The very striking resemblance between the method of description in the Beuvrequen Terrier and the *C. de Guiman* and that employed in the ninth-century documents for this region.

unwise to make any definite statement as to what happened in the interval. It is impossible to disconnect the extreme morcellement which we find at Beuvrequen during the thirteenth century from the fact of growth of population. We are told, and it is generally accepted as true, that the second half of the thirteenth century was one of comparative prosperity for rural France. For 'prosperity' we may write 'tranquillity', for it was war and violence which were the chief enemies of the peasant from 900 to 1600—to consider only these seven centuries. Now we have seen that the eleventh and twelfth centuries were also a period of constant activity in the direction of opening up new land for tillage. The extent to which morcellement had gone in the second half of the thirteenth century points to the fact that this movement had worked itself out. We can hardly believe that there was a great demand for labour in 1305, when we see the extent to which small tenures had been divided and subdivided. Plainly, then, the moment of equilibrium between the supply of rural labour and the demand for it had passed in Artois at the end of the thirteenth century. The population of Beuvrequen in 1305 can hardly have been less than at the present day. Consideration of this subject of morcellement furnishes us with a sort of check on statements regarding *défrichement*.

#### Dispersion.

The description of the evils attendant on dispersion in the eighteenth century in England has become classic. It is worth while remarking that, with or without these evils, dispersion probably existed in Artois long before the thirteenth century; that it is plainly discernible from about 1250 to the Revolution; that on the eve of the Revolution a man might hold seventy-eight scattered strips; and that dispersion still exists in these villages. That is, it has been a characteristic feature of Artesian villages in backward and unprogressive periods of their history, and continues to be so in the present more prosperous time. The time lost in going from strip to strip, the jealousy, litigation, &c., were disadvantages then, but not evils which made the existence of a prosperous peasantry

impossible. At the present day the country, viewed from rising ground to the south of St. Omer, presents the appearance of an irregularly chequered board; the various crops are cultivated often in—to English eyes—incredibly small areas. Much of the work of harvesting is done by hand-labour, as in the Middle Ages. How far this is rendered possible by Protection it is not necessary here to inquire.<sup>1</sup>

### The Open Fields.

Dispersion was a characteristic feature of the open-field system as it existed in England. There it was often accompanied in the Middle Ages by a division of the arable into three fields, or shots, which were so cultivated that the whole of one of the three portions was at a given moment lying fallow. It would be convenient for purposes of description to be able to draw a complete parallel between the English and French systems of agriculture in 1305, and to show that the arable was likewise in Artois so divided. We do not say that the plough-land of Beuvrequen and neighbouring villages was not so arranged in the thirteenth century, but it must be said at once that we have found no evidence of such an arrangement. It is impossible to say, of course, from study of such a Terrier as the one we have analysed, how the land was cropped in a given year. In such eighteenth-century maps of these villages as we have been able to examine, there is certainly no evidence of a division of the arable into three fields, or, indeed, any regular number of fields. The Atlas of Tithes of St. Omer allows for one-third of the land being fallow each year, and that is all.<sup>2</sup> The existence of dispersion is compatible with an independent cultivation of his strip by each landholder in the village; for evidence of this fact we need go no further than the fields as they exist at, e. g., Quelmes to-day. What are we to assume, then, with regard to the method of cultivation of the plough-land of these villages in 1305? We

<sup>1</sup> The Maire of Éperlecques at the present time (1913) works a farm of about 92 measures; it is in 45-50 pieces, and the most distant piece is  $3\frac{1}{2}$  kilometres from his house.

<sup>2</sup> This was the general rule in Artois on good land in the thirteenth and fourteenth centuries; cf. Thierry de Hireçon (Richard), p. 388, note 3.

can produce no direct proof that it was divided as in England. The only instance that we have encountered, in the evidence for this region, which mentions fallow, points indeed in the other direction. A lease *ad vitam*, of date 1327,<sup>1</sup> refers to 23½ measures and 6 rods of arable and 2 measures of rough pasture. This is to be left at the end of the lease as it was in July, 1327. The arable is, as generally, described as consisting of *diverses pièches*. There are so many measures sown with corn (winter) situated in the Baetshove, there are 4 measures of *tremois* or spring corn, and round these are 4 measures of fallow (*gaschière*). It would be, of course, absurd to form any theory from this one piece of evidence, and especially without exact topographical knowledge. But it points, as it stands, to the same independent cultivation as we find to-day in this neighbourhood. We have seen that there was no certain evidence for the ninth century, that there existed this division of the whole arable on the lines of the English system, and we repeat here that the general impression<sup>2</sup> derived from

<sup>1</sup> G. C. iv<sup>b</sup>. no. 112 (1327).

<sup>2</sup> (a) This impression is strengthened by study of a lease of date 1259 described in a recent number of the *Annales du Cercle archéologique d'Ath et de la région* (tome i, 1912, l'Abbé J. Hocq, Curé de St. Martin à Ath). The farm is much larger than those usual in Artois; we extract part of the description:

Devant le court de Tenre 7 bonniers :

au kesne	37	"
à le Savelonnière	7	"

Ces tieres furent aviestes de blet (sown with winter corn).  
Et s'en ient aviestes de march (blé de mars or spring corn).  
Ou sart devant le poxte 16 bonniers :

dont le vi bonniers furent semet de vecce et de mesture et le remanens d'avaine.

Derriere le Courtil le Febre 2 bonniers :

au mortier		7 journals :
à Seclies	1	"
à Rogiercrois	19½	"
derriere le Courtil à Baiart	9½	"

dont il a semet 4 bonniers de blans pois et un bonnier de ghoes.

En le Gossaude 4 bonniers :

à le Ghieskiere	4	"
à Hiermanval	35	"
au Pendutkesne	10	"

au Courtil 3 qrs.

Ces tieres furent adont a Ghieskiere (= jachère = fallow).  
Mention is made also of two other pieces *en march* and of two *aviesties de blet*.

the study of the region is that there are all the signs in 850, and still more in 1305, of a system which is far from its origin. Further, there is little of that uniformity which might point to an unmixed origin and unbroken succession.

#### Vaine Pâture—Parcours—The Bans.

The arable land of these villages was, then, in the thirteenth century open field; it was cultivated usually on a three-course system: it was not necessarily divided into three great fields, each of which bore at the same time the same crops, or was, under similar conditions, fallow. Another institution which existed in Artois, as in most provinces of France in the Middle Ages, shows us the individual tenant or proprietor of a portion of land, whether pasture or arable, subject to restriction and obliged, in one important respect, to fall into line with his neighbours. We have seen that the common pasture for the village of Beuvrequen was only about 40 acres in extent, and the portions of artificial meadow mentioned in the Terrier are few. It is in connexion with these facts that we must consider the right enjoyed by all the inhabitants of sending their stock to graze (i) over the whole of the village arable after the removal of the crops, and (ii) over all the meadow and pasture of the village within certain dates fixed by local custom.

(b) Richard quotes (in another connexion) particulars of a dispute between Thierry d'Hireçon and one of his tenants, who is accused of having altered the *assolement* (*refroissé ou desroïé lx journaus*). 'Thumas' replies that he found the said land unploughed (*en fries = en friche*), and it had been for long uncropped on account of the badness of the land (*pour le mauvaistie desdites terres*). In the March following the beginning of his lease he had sowed oats (*fist avaines*), for the land could not be got ready for wheat (*quar les terres ne pouient mie avoir leur roies pour faire blé*). Then, to bring it into line with the neighbouring land (*pour ches terres aroier a le roie des terres voisines*) he has sowed in the following March another spring crop (*disaille*), to the advantage of the soil, for two spring sowings do not harm the land so much as one of winter corn and one of corn of March (*quar ij marchenes en iij ans ne grieveint mie autant que uns blés et une marchene*).

Witnesses deposed that the *lx journaus* had received one winter and three summer ploughings (*fut bien ahanée à iiij royes. j d'iver et iij d'esté*).

The reference to 'terres voisines' seems to indicate some uniformity as regards crops as among neighbouring cultivators.

This right, known generally as that of *vaine pâture*, becomes prominent in French legislation and in treatises thereon only when the first attempts are made to prepare the way for its disappearance. In response to numerous complaints of the hardships which resulted from its continued existence, the State, from 1769 to the outbreak of the Revolution, issued a series of edicts authorizing enclosure. The law of 1791 declared that the right of enclosure was of necessity attached to ownership, and that the right of *vaine pâture* must depend on title or on possession authorized by law or custom. It disappeared slowly, however, and we find, in various treatises<sup>1</sup> on agriculture of the thirties of the nineteenth century, arguments against the *vaine pâture* which are almost exactly those employed in England in the second half of the eighteenth century in favour of enclosures. Local reasons and the force of custom have enabled the institution to survive to the present day in certain villages, among which Quelmes, near St. Omer, may be quoted.<sup>2</sup> Detailed first-hand information as to the right of *vaine pâture* is to be sought in the *Coutumes* for the various provinces of the old *régime*, though the lack of any mention of the right does not imply its non-existence. We find that in the Boulonnais, before 1777, those who held land feudally might enclose one-fifth of their fief and keep it free from the right of common pasture throughout the year. The other tenants (*cotiers*) might enclose one measure or five quarters of land, but it is laid down that this is to be situated on the roads or *en bouts et issues de ville*. That is to say, its enclosure is to interfere as little as possible with the right of pasture. Such enclosed land is to be used for the erection of buildings. Natural pasture lands not thus enclosed are in the exclusive possession of their holders from mid-March to the Feast of St. Peter (August 1), and if on that day the crop has not been removed, they may be further reserved to the day of St. Rémi (October 1) on condition that they be *houppelonné* at mid-March.<sup>3</sup> As for meadows, if the owner has not the

<sup>1</sup> e.g. *Législation de la Vaine Pâture*, Aug. Lepasquier, 1824: see pp. 26-30 for the Boulonnais, Artois, &c.

<sup>2</sup> In this village there is no common.

<sup>3</sup> Godefroi, *Dict. Hist.*, under *houppelonner*, quotes this same passage

privilege of keeping them free all the year, he is obliged to have them mowed by the day of St. Peter, and after that day any one who wishes may pasture his stock on them whether the crop has been removed or not.

Another article of the Coutume of the Boulonnais lays down that no village may encroach on the territory of its neighbour. That is, the right of *parcours*, which existed along with that of vaine pâture in many villages, did not exist in the Boulonnais. According to this custom, not only was the territory of the village open at certain seasons as common pasture, but passage was allowed to the flock or herd from the land of one parish to that of the next. This right was generally exercised up to a point half-way across the village or to the church. Hence the name of *Droit de clocher* which is sometimes applied to it.<sup>1</sup>

The Coutume of Artois, which assumes the existence of the right of vaine pâture though apparently not of that of *parcours*, says that the *seigneur viscomtier* had the power to make the *bans* of August and of mid-March. That is to say, it was his privilege to proclaim the formal opening of the village lands to pasture. A period of three days was generally allowed between the removal of the harvest and the throwing open of the arable; this was to afford the poorer inhabitants opportunity for gleaning. All cattle found in the stubble before the expiry of this interval came into the hands of the seigneur. It is from such articles in the Coutume as *Le seigneur Vicontier a connaissance de bêtes trouvées es nouvelles étendues*, which are frequent, that we are obliged to infer the existence of the right of vaine pâture. There are to be found also in the Coutumes of the Boulonnais, of Artois, of St. Omer, &c., many regulations as to the kind of stock which may be pastured on the arable, in the marshes, &c., but the details are of purely local interest and have no bearing on the general question.

from the *Coutume du Boulonnais*, and translates *faucher*, which can hardly apply here.

<sup>1</sup> Cf. *C. d'Orval*, cclxi: 'en teil maniere que les bestes de Bouelmont iroint sur toutes les communes pastures dou ban de Dulus sens damage faisant et les bestes dou ban de Dulus iroint sur les communes pastures dou ban de Bouelmont sens damage faisant.'

Article 12 of the law of 1791 runs thus: 'In the districts of parours and of vaine pâture grazed by a common herd, any proprietor or cultivator may withdraw from this system and have his beast kept in a separate herd of number proportionate to the extent of the land that he cultivates in the parish.' The common herd was apparently the rule in the region with which we are dealing, though it is not possible to make a definite statement for individual villages. A document of date 1340 mentions the *pasteurs* or *vakiars* of the 'communalte' in connexion with a dispute concerning access to the common pasture of Wizernes. It is clear that in this case they took an oath of fidelity to St. Bertin, and the same was probably the case in the other St. Bertin villages.<sup>1</sup>

The Coutume of Guînes, which is one of the earliest for this region, supplies a few details which help to give us a clearer view of the economy of these villages. No one is to go to his field in August before sunrise or after sunset, whether with his cart or without. He may cut forage at night, however, in the case of a guest arriving late. None must glean in August who is capable of gaining 4*d.* a day and his *despens*. None may comb, card, or spin in August. No one may sell ploughshares out of Guînes.<sup>2</sup> These prohibitions may be safely taken as typical of the regulations in force in the thirteenth century in this region.

<sup>1</sup> See also *C. de Samer* (1398), v.: 'le dit Jacque du Buir, contre le gré et volonté des dis religieux et de leurs gens 1, avoit emmené de leurs prisons en le ville de Lostinghem quatre vaques et quatre viaux que par les gens et officiers d'iceux religieux avoient esté mis ès dictes prisons pour ce que on les avoit trouvé pasturans es terres d'autrui oultré la deffense et edit,' &c.

<sup>2</sup> Cf. *C. de Guynes*, 1341 A. D.

## CHAPTER IX

### THE LAND-MEASURES

WITH whatever object we study the records of the district, the existence of a varied nomenclature for the land-measures soon forces itself upon our attention. This diversity of nomenclature is sufficiently characteristic to afford in itself justification for the inclusion of a section on these measures, in a brief survey of the mediaeval life of the region. The results of that survey have wider importance as a demonstration of the strength of local circumstances as factors in shaping the special form taken by the economic framework.

#### THE BONNIER

Although an inquiry into the origin, content, and geographical distribution of the Bonnier forms no essential part of this chapter, an attempt to present, with some approach to clearness, the general features of a mass of evidence may perhaps with advantage proceed by way of a review of the history of this famous measure, and of various essays that have been made to define its content. Such a review may be not without value as an introduction to the whole subject of the French land-measures and their significance.

#### Derivation.

There appears no reason to doubt the generally accepted derivation of the word *bonnier* from a root, probably Celtic, having the force of the English 'bound', and modern French 'borne'. The bonnier is, as Ducange describes it, *Modus agri certis limitibus seu bonnis definitus*. We shall see that the successors of Ducange have hardly improved upon his definition.<sup>1</sup>

<sup>1</sup> See also the dictionaries of Godefroi and La Curne de la Palaye, under *bonnier*, &c.: also Jaubert, *Glossaire du Centre de la France*, under *bone*, *bonnage*, &c.

### Geographical Distribution.

So far as we are aware, no complete investigation has yet been made of the exact geographical distribution of the bonnier. A map based on the results of such inquiry would perhaps enable us to see how far the range of the measure was governed by geological conditions, and would perhaps furnish a clue, which is at present yet to seek, to the reasons for its complete disappearance from certain areas.

To construct this map would involve comparison of representative Cartularies for all the regions of France, the Low Countries, and Western Germany. We propose here to deal merely with the districts lying more immediately round that covered by the St. Bertin documents.

The Cartulaire de Foulquin shows the bonnier as the chief measure in all the villages of the Breviatio of A.D. 850, that is to say, over a large part of the modern Departments of the Pas-de-Calais and le Nord. The testament of Gundebertus<sup>1</sup> affords more detailed information for the region of Arras.

The great Polyptyque de St. Irminon gives the bonnier as a prominent measure in the ninth century over a broad belt of country extending from east to west through the Departments of Aisne, Seine-et-Marne, Seine-et-Oise, Eure-et-Loir. For the villages in Loir-et-Cher the record is wanting, but as the bonnier existed in the Indre, we may safely infer its existence in this intervening Department.

The Cartulaire de St. Père de Chartres enables us to include the villages controlled by that Monastery, and the records for the royal Abbey of Corbie<sup>2</sup> show us the bonnier used in the country round Amiens. Following the villages of Corbie in the direction of Arras, we reach those ruled by the various Foundations at Arras, and here too the bonnier was in use.

It appears in the ninth-century Charters of St. Lambert de Liège, and from later evidence, that we may safely bring into the region of the bonnier the cultivated portions of the plain

<sup>1</sup> *Chart. Sith.* i. 2. lxxxii, &c.

<sup>2</sup> Cf. 'vinee continentes 12 bunaria terre ubi poterant colligi xx modii et amplius' (*MS. History of Corbie*).

extending from the St. Trond district across to the line of Arras and St. Omer.<sup>1</sup>

We have thus extended the area in which the bonnier was used from the region of the St. Bertin villages to a large part of the great northern plain.

#### Estimate of the Bonnier.

Before examining in greater detail the bonnier as it appears near St. Omer, it may be useful to consider some attempts to estimate its content.

The most important of these is that made by Benjamin Guérard in his famous introduction to the *Polyptyque de St. Irminon*. On the basis of various entries of the type—*habet ibi de terra arabili bunaria CXXII quae possunt seminari modii DC*, he finds that the average amount of seed required for the bonnier of land is about  $3\frac{1}{2}$  modii. As there was no certainty that this modius was that established by Charlemagne, he takes the Roman one, and on the authority of Columella, who gives the quantity of seed required for the Roman acre of 25.28 centiares, he arrives at the result that the average bonnier of the *Polyptyque de Irminon* was of 128.33 centiares, or about three English standard acres.

This result is not in reality more valuable than a statement of the average area of English counties would be, and it is all the more remarkable that Guérard should consider it worth making, as he encountered in the course of his researches striking examples of local variations in the area represented by measures of the same name in the ninth century.

D. Muley, in a note at the end of Guérard's edition of the *Cartulaire de St. Père de Chartres*, deals with the area of the bonnier on the basis of certain particular cases in which a given area is expressed both in bonniers and in another measure. He concludes that *on ne voit qu'embarras de tous côtés et une espèce d'impossibilité de fixer au juste la contenance du bonnier de terre*. Guérard's comment seems to show some change of view since the publication of the *Polyptyque de St. Irminon*. He remarks that the value of the

<sup>1</sup> e. g. *C. d'Orval*.

bonnier, like that of other measures, has varied *suivant les temps et les pays*, and recalls that he has shown its value for the St. Germain villages to be 1 hectare 28 ares. We shall see that the expression *suivant les temps et les pays* can hardly be accepted as it stands. Land-measures, at least in the early Middle Ages, did not change *suivant les temps*, and even the second portion of the phrase may require modification, for we shall see that the measures often vary from village to village.

A. Longnon, in his valuable summary of Guérard's Prolegomena, describes his methods of estimating the content of the bonnier as *plus ingénieux que probant*. At the same time he appears himself to hold the theory that local variations in the area denoted by a measure such as the journal or bonnier are due to a falling away from uniformity. At least that is what may be assumed from a phrase of the paragraph *le journal-journalis* which runs thus—*en présence de ces données qui montrent si bien le caractère éminemment local des mesures en usage au lendemain même de la mort de Charlemagne*.<sup>1</sup>

#### *The Bonnier on the St. Bertin lands.*

The second mention of a land-measure in the Cartulaire de Foulquin is for the year 788, and describes a farm as *habentem plus minus bunaria x inter terram arabilem*, &c. From 806 to 887 the use of the term *bunarium* is frequent. After the latter date, all mention of measures ceases until the beginning of the twelfth century, when the bonnier is to all appearance no longer used in these villages. So far as the St. Bertin documents are concerned, then, the range of the bonnier is curiously limited in time, and little trace of it exists outside the ninth century.

In the Breviatio, the bonnier is the chief unit employed in describing *terra arabilis*, *pratium*, *silva grossa*, *silva minuta*, and *pastura inculta*, and, as we have seen, the normal mansus was of 12 bonniers. In many cases the journal appears along with the bonnier in such a way as would

<sup>1</sup> Longnon, *Introd. to P. d'Irminon*, pp. 22-3.

naturally suggest that the bonnier was the larger area, of which the journal denoted a subdivision. A little closer examination is required, however, in face of the fact that Guérard came to the conclusion that on the St. Germain lands the journal was in no definite relation to the bonnier, but was rather less than one-quarter of it.

We extract from the Breviatio and other records of the ninth century for St. Bertin the following examples of the occurrence of areas not expressed in whole numbers of bonniers:

3 j.,  $1\frac{1}{2}$  b., 1 j., 6 b. 1 j.,  $5\frac{1}{2}$  b.,  $\frac{1}{2}$  b.,  $\frac{1}{2}$  b.,  $\frac{1}{2}$  b.,  $30\frac{1}{2}$  b.,  $43\frac{1}{2}$  b.,  $1\frac{1}{2}$  b.,  $3\frac{1}{2}$  b.,  $12\frac{1}{2}$  b.,  $\frac{1}{2}$  b.,  $\frac{1}{2}$  b.,  $4\frac{1}{2}$  b., 1 j., 3 j.,  $\frac{1}{2}$  b.,  $1\frac{1}{2}$  b.,  $\frac{1}{2}$  b.,  $1\frac{1}{2}$  b., 1 j., 8 b. 1 j., 1 b. 1 j.,  $32\frac{1}{2}$  b.,  $7\frac{1}{2}$  b., 1 b. 1 j.,  $12\frac{1}{2}$  b., 7 b.  $1\frac{1}{2}$  j.

Here the half bonnier is frequent, the single journal occurs seven times,  $1\frac{1}{2}$  j. once, two journals not at all, three journals twice. There is no example of  $3\frac{1}{2}$  journals, but the conclusion seems to be that though the basis of nomenclature as between journal and bonnier is distinct, yet the journal was, in the ninth century, on these lands, a quarter bonnier.

It would not be possible to treat the question of the content of these measures with the aid of ninth-century evidence alone. Ample material is to be found in later centuries.

#### Land-Measures after the Ninth Century.

There is unfortunately a broad gap in the evidence from the end of the ninth century to towards the end of the eleventh. As transactions in land again appear in the records we become aware that the bonnier has disappeared from the villages of the Breviatio and from the region of St. Omer generally. This change cannot be traced in detail. We know that it took place on the land of other great abbeys lying to the west and south of St. Bertin: the bonnier survived on those lying to the east and south-east. For its disappearance, the *locus classicus* is a sentence of the monk Paul of Chartres, who, writing in the eleventh century, says, *In Abbonis villa—de terra inter diversa loca bonnuaria XV. Ignoro bonnuaria quid sint sed sicut didici in hac villa habetur terra aratrorum novem.*<sup>1</sup>

<sup>1</sup> C. de St. Paul de Chartres, p. 38.

In place of the bonnier and journal we meet what appears confusion : that at least is the first impression from reading the thousands of charters dealing with land for the region from the Somme to the Scheldt. Gradually, however, we become aware that this apparent confusion may be to some extent removed. We are able to map the region into loosely defined areas, each with its own peculiar nomenclature of measures. Thus, in the district lying immediately around St. Omer, the bonnier is replaced by the 'mesure';<sup>1</sup> in the direction of Gravelines or Poperinghe we have a 'mesure', but one divided into three 'lignes', each of 100 verges, whereas that of St. Omer is divided simply into 100 verges.<sup>2</sup> In the neighbourhood of Boulogne begins the region of the journal, and towards Arras that of the 'mencaudée'. It thus becomes possible to assign a document to its district almost at once by examination of the land-measures employed.

The records show other systems of land-measurement on quite different bases which have no apparent connexion with those described above, and these two sets often exist in the same villages.

We may take as an illustration the grants made by the Count of Guînes about the year 1084, where we have a donation of *terram quatuor dierum in villa Bissengehem et terram triginta dierum apud Allenges et apud Morlingehem et carrutatam* (sic) *dimidiam terrae apud S. et prata triginta dierum in pago Bredenarde*. Generally these lands are described in terms of 'dies', applied strangely enough both to *pratam* and *terra arabilis*, but we find also such expressions as *decima vij carrucarum, 3 carrucae terre*, &c. Similarly, on the St. Vaast lands we have, for the villa Bigartio, as it existed in the twelfth century, *est etiam terra dominica ad 3 carrucas in 3 culturis*, and elsewhere reference is made to ' $\frac{1}{3}$  of 3 carrucae terre ad societatem'.<sup>3</sup>

<sup>1</sup> Cf. *Chron. Watt.*: 'diurnalia quae vulgo mensuras nominamus.'

<sup>2</sup> *G. C.* (1269), 40 mensurae 108 verges, and *G. C.* vii. no. 281 (1463).

<sup>3</sup> For measures on various bases cf.—

*G. C.* (1319): 11 verandaux de terre at Oxelaere :

Duchesne (1193): 'quinque cornellos terrae jacentes in Boderike' (*Chron. d'Andres*).

Evidence of this kind would prevent one from supposing any approach to uniformity even within the narrow limits set by the identity of names of land-measures in a given set of villages. But irregularity does not end here: we find that the same nomenclature for land-measures does not involve uniformity of area denoted.

A great monastery was frequently obliged in its book-keeping to make such calculations as these:— *VI<sup>m</sup> mesures XLVI verges qui font II<sup>e</sup> et XVIII journals et XIII verges de terre.*

An excellent illustration of the diversity of content of measures of the same name is offered by a document included in the introduction to the *Cartulaire de St. Trond*.<sup>1</sup> Part of it is in the nature of a ready-reckoner, by means of which the measures of other localities may be expressed in terms of the local measure; another portion, under the heading *ex libro terrarum Monasterii de Mielen*, gives a long and somewhat confused list of the value of the 'rods' of various parts of the Low Countries.

In the first table the *bonnier* appears as the 'bonder': it is thus divided:

16 voet by 16 voet	= 1 raeproij.
20 raeproije	= 1 lantroi of St. Trond.
5 lantroi je	= 1 zille.
4 zille	= 1 bonder.
20 lantroi je	= 1 bonder.

*G. C.* (1407): 2 lis. 6 verges de terre pour chacun Wizernes.

*G. C.* (1296): 2 lizières de terre . . . Hallines.

*Arch. du Chapitre*, 1294: 2½ lecta . . . Hallines.

*G. C.* v. no. 70: moies de terre.

*St. Barthélemy*, no. 126: '3 jours et vaut le journal iii<sup>ie</sup> verges.'  
'15 havos de terre.'

*G. C.* i. no. 227 (1165): '4 sectaria terre.'

The various *Cartulaires*, as *St. Hubert*, *Orval*; *falcata* or *fauchées* for meadow.

Duchesne (1280): 'set cens livrées de terre par an', and cf. *G. C.* (1220): 10 libratas terre at Seninghem; and *St. Winoc*, 1107, p. 86, terra 100 ovium.

For Carruca see also *C. de Samer*, viii. 1173; *G. C.* ii. 1240, Wacquinghem, and 10<sup>b</sup>, no. 94 (1325); *C. de Licques*, xxvi. 1222, Longueville (une demie charrue de terre); *C. de Théroutanne*, 2, 7, 9 ('quantum una carruca per annum arare potest').

<sup>1</sup> *C. de St. Trond*, Introd., pp. xlviii–lvii.

Then follows a comparison between the bonder of St. Trond and those of other places. It is unfortunately incomplete, but is sufficient to furnish some idea of the way in which the 'bonnier' varied from place to place.

Thus :

20 lantroijs	make the bonder of St. Trond.			
24 "	"	"	"	Rummen.
25 "	"	"	"	Wellen.
23½ "	"	"	"	Gingelom.
21 " + 4 corten roijen	"	"	"	Attenhoven.
21 "	"	"	"	Montenaken.
20 " + 26 "	"	"	"	Gorsumm.
19 "	"	"	"	Brusthem.

It is important to notice that several of these places are quite close to St. Trond.

Part of the second list, under the title *Sie sint Maeten in Kempen*, deals with the length of the rod, expressed in feet, in nearly two hundred villages of the provinces of Limbourg, Brabant, and Liège, covering roughly the lands between Maastricht in the east and Brussels in the west.<sup>1</sup>

We have selected from this list of villages one hundred and fifty, of which the modern sites can be fairly well identified. These have been arranged according to the canton to which they belong. As the canton is a division of small area, it is certain that whatever diversity may be shown existed within a group of neighbouring villages. We give the villages and rods of the first canton in full, as typical of the rest.

Canton.	Village.	Length of rod in feet and inches.
Loos	Loos	16 0
	Wintershoven	15 2
	Guygoven	16 2
	Heim St. Humbert	15 5
	Opheer	16 2½
	St. Tryden	16 7
	Wellen	18 1
	Ulbeck	15 9

<sup>1</sup> For many of these villages near the Meuse and their measures cf. *C. d'Orval*.

<i>Canton.</i>	<i>Village.</i>	<i>Length of rod in feet and inches.</i>	
Loos	Alken	15	8½
	Neron-sous-Werm	15	6
	Grand Loos	15	6
	Groeningen-sous-Vliermaal	15	6
	Brouckom	16	0
	Vliermaal	15	6½
	Jesseren	16	0

For fifteen villages there are thus eleven different rods.

<i>Province.</i>	<i>Canton.</i>	<i>No. of villages.</i>	<i>Variations of rod.</i>
Limbourg	Tongres	16	3
	St. Trond	6	6
	Bilsem	17	5
	Mechelen	4	3
	Herck-la-ville	3	3
Liège	Landen	10	9
	Texhe les Slins	9	4
	Waremmé	5	3
	Hollogne les Pierres	2	1
	Nandrin	1	1
Brabant	Léau	10	10
	Tirlemont	14	10
	Jodoigne	18	8
	Diest	3	3
	Glabbeek	5	4
	Perwez	5	4

Villages situated outside these provinces are: Montenaken and Arsen in Dutch Limbourg, Dilsen near Maaseyck, Loenbeek near Louvain, Ophain and Pietrain near Nivelles, Limal and Rosiers near Wavre; of which no two have the same rod.

We have then for this portion of the Low Countries clear proof of diversity in the area of the bonder or bonnier, and in that of the rod into which it was subdivided, or on which it was based.<sup>1</sup>

#### The Measures before the Revolution.

It is well known that the metric system adopted by the French Republic has by no means completely displaced

<sup>1</sup> Cf. La Curne, under *bonnier*: 'on ne poot veoir un demi bonnier de terre loing,' where the bonnier is used as a linear measure.

the older systems. As regards currency and measures of weight, it is the older names only which have survived ; the ancient land-measures continue to exist in practice though not in law.

We may examine these measures as they are still used in the villages of the Pas-de-Calais and le Nord, with full confidence that they have remained unchanged since the period immediately following the Norman Invasion.<sup>1</sup>

### *The Bonnier.*

Let us notice first the fate of the bonnier ; it no longer exists in the Pas-de-Calais. In the Nord it appears to survive along an irregular line extending roughly from Merville, about twenty-five miles by road from St. Omer, to Trélon in the south-east corner of the department of le Nord.

In many, and perhaps in all, of these cases where the bonnier remains, there exist along with it other smaller measures such as the *mesure*, the *mencaudée*, the *journal*, and the *rasière*.<sup>2</sup> Thus in the arrondissement of Avesnes we find in many villages the bonnier, rasière, and journal in use, the journal being often a third of the bonnier, and the rasière bearing no exact relation to it. At St. Aubin, for example, the rasière is of 31 ares, the journal of 47 ares, and the bonnier of 1 hectare 41 ares. On the other hand, there are villages where the journal is not a multiple of the bonnier ; at Trélon it is nearly one-half ; at Neuville more than one-third ; again, at Merville and Estaires, the two villages nearest to St. Bertin where the bonnier is still used, the journal is exactly one-fourth of the bonnier.

These bonniers, as we should expect from the evidence previously considered, vary very much in area from place to place. There are some of 87 ares, or a little over two English acres ; others of 1 hectare, 68 ares, or more than 4 acres. We

<sup>1</sup> It is difficult to give references in detail. This chapter is based on many thousands of entries in the various Cartularies, on the figures for the present day on first-hand information, and on Berode, *Enseignements utiles pour la Direction des Affaires publiques*, tome ii, 1865.

<sup>2</sup> This measure appears to be by origin one of capacity, and recalls the English 'strike'.

have counted at least fourteen different ones in the Nord : there are probably many more. In the canton of Maubeuge alone there are nine distinct bonniers.

The bonnier remains in a comparatively small proportion of the villages of these two Departments: it is only when we become acquainted with the other land-measures of the region that we see how far diversity can go.

In the first place there are in these Departments at least 25 different 'perches' or 'verges' varying in length between 14 and 22 feet, and the foot may be of 10, 11, or 12 inches.

The 'mesure' is in use over the greater part of the Pas-de-Calais, and in part of the Nord near St. Omer. The rasière, mencaudée, and journal are the commonest in the Nord. In drawing up the following table we have neglected all fractions of the are, thus reducing considerably the range of variation and concealing much diversity. (The English acre = about 40 ares.)

In the Pas-de-Calais the 'mesure' varies from 35 to 53 ares : there are at least seven different 'mesures'.

In the Nord, the unit, whether mencaudée, journal, or rasière, varies as follows :

For the whole Department, within the limits of 21 ares and 53 ares there are at least twenty-six different measures, e. g. :

Canton d'Avesnes	7	different	measures.
„ Bavai	8	„	„
„ Berlaimont	10	„	„
„ Landrecies	8	„	„
„ Le Quesnoy	7	„	„
„ Solre le Château	8	„	„
„ Trélon	3	„	„
Arrondissement of Cambrai	10	„	„
„ Valenciennes	7	„	„

The area within which any one of these measures prevails is small, and there is often wide variety in a restricted area.

If we took into account differences smaller than one-fortieth of an acre we should lengthen our list of variations, and even then we should not have presented fully the amount of diversity.

In the same village there may be one measure for arable and another for pasture; or there may be different measures in two hamlets of the same village: or a road may serve to mark off two areas using different measures, and so on. In the *arrondissement* of Valenciennes there appear to be at least nine important systems of land-measurement. That of Valenciennes itself is typical of the district. It includes a *mencaudée* of 22 ares, the  $\frac{1}{4}$  *mencaudée* is the *boiteau*, the  $\frac{1}{4}$  *boiteau* the *pinte*; along with these exists a journal of 28 ares, a *rasière* which is  $1\frac{1}{4}$  *mencaudées*, a *bonnier* of 5 *mencaudées*, and a *muid* of 8 *mencaudées*.

Our short statement of some of the features of these land-measures amounts to little more than a demonstration of lack of uniformity, and we are obliged to leave important problems unsolved. The measures—as we find them in the nineteenth century, in such lists as that of St. Trond, in scattered references in the records of the early Middle Ages—show a variety which is not the result of a falling away in a time of disorder and divided control from any earlier, centrally imposed, and uniform system. It often represents the survival through long ages of the division of the surface of the soil by primitive cultivators. Some at least of the measures which have survived through the settled government of the Third Republic may have been local measures in Roman times, and the small groups of villages using the same measure may have their origin in the circumstances under which early settlement was carried out.

It is not impossible that a local chief or feudatory may have sometimes extended to neighbouring lands the use of the measure employed near his own château,<sup>1</sup> but the group of villages with common measures was connected rather as cause than as effect with political divisions, and the limits of such divisions must often have been fixed by the existence of some bond of race or contemporary settlement uniting those within them.

There can be no direct proof of the identity of the land-

<sup>1</sup> As he did for the measures of capacity, of which there were many in the neighbourhood of St. Omer, e. g. those of Guînes, Boulogne, Beuvre-  
quen, St. Omer, Desvres, &c.

measures in use to-day with those of Merovingian or earlier times ; we can only indicate the way in which these units seem bound up with the soil, and with those institutions like dispersion and morcellement which are most intimately connected with it, and hence the most tenacious.

The bonnier of the ninth century had deviated greatly from its original form. Perhaps employed first as a division of the arable, it had come to be used for all varieties of land. It was a 'large' measure of content varying with the locality, but falling as a rule within the limits of two and four English acres. We enter the region of surmise when we ask what was the basis of this division in the open arable.

In the St. Bertin country this bonnier was divided into four journals, further south often into three.<sup>1</sup> Do these journals belong to a later system of more intensive culture, or did the bonnier, at the time of its earliest use, represent so many days' ploughing, and was it thus built up from the journal? Again, how are we to explain the survival in comparatively few districts of the bonnier? We should expect the change to be connected with some divergence in methods of cultivation, as between, say, the region of Maubeuge and that of St. Omer, but it is difficult to find facts to support such a theory.

Excessive morcellement, as we see it in northern Artois, would tend to force so large a measure out of use, but to be positive in statement here would require a comparative study of at least the whole of the northern French plain.

What has been said as to the content of the bonnier applies generally to the early measures. We are not to imagine a group of cultivators carrying with them to new ground an old set of standards. Rather do their standards, and perhaps their methods, result from the peculiar circumstances under which labour is employed.<sup>2</sup>

Another interesting problem arises when we consider these various measures, and the rod, verge, or perch into which

<sup>1</sup> Cf. Duchesne, *Extrait du Registre des Chartes de l'Abbaye de Tronchiennes*, p. 160 (1247): 'apud Salechem pro viginti et septem bonniers et duabus mensuris.'

<sup>2</sup> Cf. especially Vinogradoff, *English Society in the Eleventh Century*, p. 263, &c.

they are subdivided. It is well to remember that the bases of measurement are different as between rod and journal, just as they are between journal, rasière, and carrucate. It appears reasonable to suppose that the larger unit is the older, and this is borne out by the fact that in this region the rods are sometimes of such irregular lengths as 18 feet 2 inches 9 lines, 16 feet 9 inches 4 lines, &c.<sup>1</sup>

Finally, variety from region to region is usually taken as the result of differences in quality of soil. This may be generally true. It does not account for the comparatively minute differences we find in this region from village to village. It is these variations within narrow limits which give to the whole question of the land-measures its intense and peculiar interest. They are the result of human activities exerted under the accidental influences of locality.

<sup>1</sup> For methods of measurement see *G. C.* iv<sup>b</sup>. 133, Houelle: 'si avant que verghe s'estent' (a common formula); and cf. Duchesne, p. 3, 'quae fere lxxx jugera sine geometricalium perticarum mensura continet.'

*St. L. de Liège*, ccclxv: 'Item mensura annonni, mensura vini, mensura pannorum et virga de qua mensuratur terre sunt apud Sanctam Mariam,' etc.

## CHAPTER X

### THE RAPPORTS AND DÉNOMBREMENTS

THE features of rural life in this region before 1350, which have been examined in preceding chapters, were such as the evidence itself forced upon our attention as characteristic. Fully to appreciate the relative permanence of certain elements in the life of the said Bertin villages in this age, as contrasted with others which were plainly disappearing, it is necessary to glance at the evidence of a period somewhat later than that of our essay.

We are fortunate in possessing in the *Rapports* and *Dénombrements* an unbroken series of documents extending from the later years of the fourteenth century to the Revolution. It is true that the evidence they present is one-sided; it is all the more striking as showing the enduring quality of much that appeared in the Terrier of Beuvrequen. It was customary for those who held 'noblement'<sup>1</sup> of the great religious houses to make periodic declarations of the land they held, the tenants who held of them, the payments they received, and so on. These reports formed an important section of the archives of such abbeys as St. Vaast and St. Bertin. The Registers which survive often record, too, along with the Report, the previous occasions on which similar declarations had been made.<sup>2</sup> There

<sup>1</sup> Cf. *Coutume de St. Omer*, p. 108: 'au dit Bailliage et Châtellenie y a 3 natures de biens ou tenures, les uns tenures en fief, d'autres tenus en roture vulgairement dites cotteries et les troisièmes qui sont terres franches improprement nommées Francsaleux et néanmoins sujettes au rapport et déclaration.'

The 'Rapports' are usually, however, of fiefs; the 'alleux' are rare in the evidence.

<sup>2</sup> There are many such registers in the *Archives St. B.* at Arras: in the *Archives du Chapitre* at St. Omer: in the *Archives* at Amiens, &c. Cf. *G. C. v. Supp. Rapport no. 38*: 'D'après le grand registre des fiefs'; also *Invent. Lécques*, p. 173.

The books of fiefs often contain plans.

is thus, sometimes, a list of the changes of ownership which a given fief had undergone during several centuries. The Dénombrements became urgently necessary in the long period of disturbance which began about 1340.<sup>1</sup> Such references as the following, occurring in the text of the Reports themselves, remind us of the background of war which we must supply for these documents: *Je nen puis presentement trouver aucun enseignement tant pour ce que mon dit fief a esté en tant de mainz comme pour le fait de cette presente guerre.*

*À cause de certains tenements que je ne puis de present trouver pour les guerres.*

The earliest Dénombrement of which the Grand Cartulaire preserves a copy is of date 1383; for the years 1406-7 there are more than 70, covering a large part of the villages of Coyecques, Arques, Rocquetoire, Wizernes, Moulle, Hallines, Tatinghem, Quelmes, Listinghem, Esqueredes, &c. They vary greatly in length and importance. Thus, of 71 that exist in the supplement to vol. vi of the Cartulaire, we have 28 which are mere titles in Flemish of Dénombrements for possessions of St. Bertin lying in Flanders: of the remaining 43, the majority occupy less than a page. Some of the larger ones fill more than fifteen folio pages.

On account of the importance which attaches to documents so representative as these, we have analysed the smaller Dénombrements, taking them in the order in which they appear in the supplement to vols. v and vi of the Grand Cartulaire. They refer (in vol. v) to amounts of—

4 mesures, 12 m., 7 quarters, 5 m.,  $3\frac{1}{2}$  m.,  $2\frac{1}{2}$  m., 40 m.,  $8\frac{1}{2}$  m., 5 q., 5 m.,  $3\frac{1}{2}$  q., 7 q. 15 verges, 8 m. 18 v., and 7 q., 14 q. + 10 m. + 5 q. + 5 q. + 10 m., 36 v. of meadow, house and 2 m.,  $4\frac{1}{2}$  m. + 7 m. + 7 m. + 2 m. + 11 m. + 19 m., 11 q., 3 m., 4 small pieces, house and two pieces, 13 m., half of (3 m. + 5 q. + 4 lis. + 2 mes.),  $1\frac{1}{2}$  m. + 11 v., 7 m.  $33\frac{1}{2}$  v.,  $4\frac{1}{2}$  m., 13 q. + 12 q., 6 m., 5 m., 5 q.,  $13\frac{1}{2}$  m. + 23 m.,  $\frac{1}{2}$  m. + 5 v., 6 m., 60 v., house and  $1\frac{1}{2}$  m., 9 q., 7 q., 12 m., 8 m., several small pieces, 53 v. + 11 m.,  $\frac{1}{2}$  q. + 3 m.,  $1\frac{1}{2}$  q. + 4 m.,  $3\frac{1}{2}$  q. + 3 m., 16 v. + 5 m., 3 q. + 18 m.; analysis of 25 in vol. vi gives very similar results.

<sup>1</sup> They were often enforced by royal order; cf. G. C. x. no. 55.

Let us take next in greater detail a longer Rapport, noting that what we have to say here as to the formula of description applies equally well to the smaller Dénombrements and to many thousands of others for the fifteenth and succeeding centuries.

This report was made in 1407 for a fief held of St. Bertin at Rocquetoire. It begins—

‘C'est le rapport et dénombrement que je jehan macaire al nom et comme mary et bayl de Maroye de Bilques fille et hire-tiere de feue demiselle aelis de Bilques jadis sa mere et a cause de elle fay et baille a pourvus et disces mes tres chiers et honnerez seigneurs, messeigneurs les religieux abbé et couvent de l'Eglise de St. Bertin en St. Omer de ce que je tieng et entend a tenir d'eulx et de leur dicte Eglise noblement en un seul fief et hommage a cause de leur terre de Roquestor.’

The report goes on to describe the ‘manoir’ and the scattered pieces held with it; they are of area 2 m., 6 q., 6 v.,  $4\frac{1}{2}$  m.,  $\frac{1}{2}$  m.,  $\frac{1}{2}$  q.,  $1\frac{1}{2}$  q., 4 v., 1 q.

*Sensievent les fiefs que on tient de moy.* They are six in number and the areas of land involved are of 6 m., 2 m., 1 m. 20 v., 6 q. 8 v., 4 m. 80 v., 4 m. 32 v., respectively. Next *s'ensievent ceulx qui tiennent de my en coterie a la cause dicte.* These are the tenants *en roture*, and form the bulk of the tenants in these villages.<sup>1</sup> It need hardly be said that the tenure on which the land is held has no connexion with the importance of the holding, and that the fief in these centuries is held ‘noblement’, though it be a bourgeois of St. Omer who holds it.

Of these *tenants cotiers* there are in this case forty. To describe their holdings, no fewer than 166 sections are required, for, as at Beuvrequen and as nearly always in Artois, they are composed of a house, the land immediately round it, and a smaller or greater number of scattered pieces. It was clear from the Terrier of 1305 that the pieces were thus dispersed. The Dénombrements employ a method of description in which the position of a strip of land is fixed by naming the holders of the adjoining pieces. Thus, *et l'autre pièche contient 3 mesures et demie gisant sur le verde voye que va de Wiserne*

<sup>1</sup> Cf. Ducange, under *Cotagium*, &c.

*a Tadinghem vers oist aboutans vers west a le terre Mikid pigache et envers sud a le terre de mes dis seigneurs de St. Bertin. Or, item 14 verges ou environ gisant en dehors du dit manoir alistant au lez deval au fief loys le couvreur du lez damont a le terre hanekin solier.*

It is the repetition of this formula of description that gives to some of these rapports their great length. To the student of the documents of Artois it is *the* characteristic sentence, repeated many thousands of times for every village in the region during five centuries, in Dénombrements, tax rôles, *biens nationaux* lists, and in notices of sales in 1913.<sup>1</sup>

The holdings of these forty tenants may be thus briefly summarized. The units employed are the mesure, the quarter mesure, and the verge of 100 to the mesure.

a. Piece of 45 v., 2 v., 1 q., 2½ v., 1 m., 6 v., 18½ v., 18½ v., 5 q., 4 v., 60 v., 32 v., 3 q., 3 q., 1 q., 8 v., 33 v., 6 q., 2 v., 3½ q., 7 q., 7 v., 1 m., ½ q., 6 q., 6½ q., 3 q., 8 v., 5 q., 1½ v., ½ m., 5 v.	45 v., 3 q., ½ m., 14 v., ¼ mes., 10 v.
b. 31½ v., 1½ q., 18½ v., 10 v., 46½ v., 20 v., 12 v., 11 v., ½ m., 31½ v., 14½ v.	h. 90 v., 28 v., 36 v.
c. 80 v., 28 v., ½ m., 2 v., 8½ v., 2½ v., 18 v., 51 v., 4 v.	j. 31½ v., 1 q., 2½ v.
d. 31½ v., 1½ q., 18½ v., 10 v., 46½ v., 20 v., 1 q., 6½ v.	k. 2 m., 1 m., 3 q., 94 v., 5 q.
e. 5 q., 8 v., 5 q., 8½ v., ½ m., 6 q., 7½ v., 90 v., 7 q., 5 v., 1 m., 12 v., 1 m., 1 v., 64½ v., 6 q., 4½ v., 5 q., 19 v.	l. 2 m., 1½ q., 11 v., 1 m., 2 v., 3 q., 10 v., 20 v.
f. ½ m., 2½ v., 8½ v., 2½ v., 18½ v., 56 v., 4 v.	m. 1½ q., 8 v.
g. 1 m., 7 v., 5 q., 4 v., 5 v., 3 q., ½ m., 20 v., 48 v.,	n. ½ m., 36 v., 5 q., 11 v.
	o. ½ m., ½ q., 1 q., 2½ v.
	p. 49 v., 5 v., 34 v., 34 v., 61 v.
	q. ½ q., 1½ q.
	r. 20 v.
	s. 1½ m., 5 m., 1 q.
	t. ½ m.
	u. 1½ m., 7½ v., 57 v., 1½ q., 14 v.
	v. 1½ q., 3 q., 3 v., 10 v.
	w. 48 v., 14 v.
	x. 2 m.
	y. 1 q., 5 v., 6 v.
	z. 57 v.
	A. 6 q.
	B. ½ m., 44 v.

<sup>1</sup> Cf. *Registre Couvent* (1323) : 'les quelles terres sont reprises par listes et abouts à la chartre.'

C. 2 m., $6\frac{1}{2}$ v.	K. 5 q., 1 q., 7 v.
D. 3 q., 6 v.	L. 5 q.
E. $15\frac{1}{2}$ v.	M. 1 m.
F. $15\frac{1}{2}$ v.	N. 40 v.
G. 5 v., $\frac{1}{2}$ m., 34 v.	O. $2\frac{1}{2}$ m., 1 m., 16 v., $1\frac{1}{2}$ q., 1 m., $\frac{1}{2}$ q., 63 v., 9 v.
H. $2\frac{1}{2}$ q., $\frac{1}{8}$ v., 3 v.	P. 6 q.
I. J. 4 q., 7 v., 45 v., 2 v., $2\frac{1}{2}$ v., 1 m., 18 v.	

Jehan Macaire declares also for a rent received for a road by which *ils vont parmi mes terres au mares de Rocquestor*, as well as for a *disme courant sur les dites terres cotieres duquel dismage je prends lieve et emporte les a pars a l'encontre du cappitre de Terrane*. If we add that some of the lands pay terrage, and that one piece is situated *sur le lez damont ou le four est*, we see that a Dénombrement may reveal a good deal of mediaeval rural life.

The report ends—

'Item tieng et enteng a tenir de mes dis seigneur tout men dit fief et tenements fons et propriété au quel fief jay justice viscontiere bailli et franshommes eschevins a jurer jugans en ma court du dit lieu de le Calerenie toutes fois qu'il appartient et que le cas y assiert et y a toutes amendes de 60 sols et au desoubs.'

The contents of this last paragraph need not detain us. We have been obliged to leave almost unnoticed many sides of mediaeval life, and the administration of justice with them. Nor is it necessary to emphasize the extent to which morcellement has gone in the village of Rocquetoire in 1407. One other point, however, is of importance here. Evidence such as the Rapport we have been considering creates the impression of almost universal dispersion and morcellement. For that reason we must refer to a Dénombrement which is far from typical, but has to be noticed because of its importance in the question of village origins in this country.

Jean Brusset in 1406 presents a declaration for a farm at Quelmes, *Prime le lieu de Inghelsberch et le terre appartenant au dit lieu tant en une pièche gisant en le parroche de Quelmes contenant six vins et quatorze mesures*, and to this are attached other pieces of  $5\frac{3}{4}$  mes., 22 mes., and 58 mes.

Similarly we note that at Tubersent, in 1426, at the expiry of a lease, pieces of 8, 20, 18, 5, 13, 38, and 9 journals respectively are mentioned as left under crop by the outgoing tenant. There is much evidence to show that fuller knowledge would often reveal that these larger pieces were composed of smaller pieces recently grouped, but in other cases, as the above at Quelmes, a farm had formed one large block from early times.

The only general statement that can be made as to the payments due from the farms described in the *Dénombrements*, is that there is general lack of proportion between the amount of land held and the payments expected.<sup>1</sup> At Rocquetoire 4*l.* per mesure was the usual payment, though there are a few rents in corn and poultry. We find a half-mesure owing 7 quarters of oats and another half-mesure paying 7*l.*, a half-mesure paying one quarter, one mesure the same amount. What is clear is that these portions of land are thus burdened and will remain so, and that in default of payment the farm returns to the seigneur.

<sup>1</sup> Cf. Chapter V, the various *Rôles*, e. g. Quelmes, &c.

## CHAPTER XI

### CONCLUSION

IN conclusion, it may be well to emphasize that many roads lead to the Middle Ages, and that such completeness of knowledge as is possible can come only from combining the results of studies of many elements intimately connected, but considered for the moment in comparative isolation.

The results of our examination of one element of mediaeval life in Artois may be thus briefly summed up.

The origin of serfdom in France does not lie within the period 900-1350. It is sufficient here to say that the installation of a dependent, perhaps a slave, on a holding introduces at once a double relation between the lord and the cultivator; and the new relation contains important possibilities of change: time is on the side of the serf.

He is installed on land he may not quit, but the personal hold of the lord is loosened, and must be recognized by certain payments which become necessary only when complete ownership has ceased. The action of various causes, chiefly economic, brings it about that the relation between dependent and lord becomes less simple, and that the status of the peasant and his position as tiller of a portion of soil, become increasingly distinct, until at the end of the thirteenth century we are able to see that the aspect of dependence which descends from close personal control, or 'slavery', is almost negligible; status and tenure of land by the peasant could, at that date, be considered separately. We have, then, a simple personal relation lying outside our period, and within that period some stages of the development during which the serf became the peasant of the early fourteenth century.

The peasant, thus freed, remains often in hereditary possession of his land, which he forfeits on non-fulfilment of the

obligation of payment of dues and regular cultivation. The holding remains burdened for centuries with rents which often resemble those exacted at the first settlement of dependents in *mansi*.

The progress of the peasant in the later Middle Ages in Artois may be stated more easily than that of the group of which he formed part, or of the section of territory in which his land lay. Much in the history of the villa after the ninth century we have found to be obscure. The chief difficulties, such as those presented by the *Cartulaire d'Auchy*, would have to be examined rather in a detailed study of the ninth-century villa than in this essay. It is here important to consider the term 'Domaine rural', which is the one generally used for the group and section to which we have referred.

The words imply a unit, and may easily be used loosely so as to conceal important changes.

In the first place, rights of justice, the *tonlieu*, rights of passage, all that may be implied by 'banalités', have no essential connexion with the activities of a rural group; they are to be found equally in towns.

The same is true again of the term *parish*, full of significance in other directions. In the *dimage* we have a division which is closer to the soil, but the right to tithes was so largely subdivided as to make difficult the acceptance of the *dimage* as our unit.

We may eliminate so much, then, in seeking to justify the description 'Domaine rural' as implying not only a unit, but a unit for cultivation.

In the ninth century there can be no doubt of the existence of rural groups inhabiting areas which contain a *demesne* tilled in great part by the labour of those holding dependent *mansi*. In the eleventh and twelfth centuries that method of cultivating the reserve has practically disappeared, and instead of the former week-work there is only occasional task-work. The cause of the change can hardly be stated with certainty; we have been obliged to point to the period of the invasions as a potent force, without considering it satisfactory as a complete explanation. A force within the *mansus* may have been the strong

tendency to division among the children of the holder, leading to the destruction of the mansus of 850 as a unit in the system of cultivation of the reserve.

The absence of the week-work in our period seems to furnish the most important reason for a close criticism of the title 'Domaine rural'. We have still to seek in the thirteenth and fourteenth centuries some bond among the inhabitants of these villages which is, in essence, agricultural.

We have found reason to believe that cultivation was in this age largely individual. We were unable to picture the arable divided into three or four great fields, each of which would be in one year under the same crop: such a system would give us at once a group of peasants brought into close union in a cardinal part of their work: but there is no evidence that it existed in this region.

Surviving in these centuries, on the other hand, we have the 'vaine pâture', the throwing open of the village arable and meadow after harvest to the flocks of those holding land in the villages, to the exclusion of outsiders; with this we may associate use of the common and rights of usage in the woods.

If with these we consider dispersion, we seem to have the core of the older system, the most enduring of the features which enable us to think of the dwellers in these villages as a rural group.

The St. Bertin village at the beginning of the fourteenth century cannot be described in simple terms: it is a parish or tithe-land, an area within which certain taxes are levied, certain rights of justice are exercised: it is, within the limits we have indicated, a unit for cultivation. Under each of these aspects it appears as having undergone profound changes during the long centuries since its origin.

## APPENDIX

### I. PART OF THE RAPPORT FOR QUELMES, 1450

From the *Grand Cartulaire de St. Bertin*, Vol. VII.

C'est le rapport et denombrement que je, Jehan Dausque, Escuyer, fay et baille a Reverend pere en Dieu l'Evecque de Therouanne, Abbe de l'Eglise et Abbaye de St. Bertin en St. Omer, et a mes-seigneurs les Religieux dycelle eglise, de ce que je tieng et adveue à tenir d'eulx et de leur dicte eglise noblement et en chincq fiefs et hommages, desquels aveuc de toutes les appartenances et appendices sera faite cy apres declaration et de chascun fief a particulier.

*Primes.* Mon premier fief se comprend et estend en ung manoir ou je demeure estant a Kelmès contenant trois mesures et chincq verghes de terre ou environ aboutant a l'atre et a ung enclos appartenant a mes dis seigneurs. Item. ung courtil contenant une mesure ou environ alistant cest l'enclos de mes dis seigneurs et nort au quemin. Item. deux mesures et quartier et demi de terre ou environ listant cest aux hoirs J. D. aboutant zud à J. D. dit M. Item. une autre pieche de terre contenant seize mesures et ung quartier ou environ seant a Outreval aboutant nort a la terre du vieux flos et zud au courtil d'Outreval. Item. une autre pieche contenant trois mesures et dix-neuf velghes ou environ seant assez pres des seize mesures sus dittes tenant aux terres de Inglebert nort et cest. Item. une autre pieche de terre contenant quatre mesures et demie et vingt-deux verghes ou environs pres de la ditte pieche alistant cest a le terre P. de L. Item. nœuf quartiers de terre ou environ seant a Woul-sangue alistant west a la terre J. P. et aboutant zud au quemin. Item. six quartiers de terre seant a Oultreval aboutant zud a C. W. listant cest a J. de W. Item. onze quartiers de terre ou environ gisant a Bracqueberg alistant cest a J. P., aboutant nort aux terres des mes dis seigneurs. Item. et a cause de mon dit fief jay plusieurs hommes qui tiennent de my plusieurs tenemens dont ils me doivent plusieurs rentes heritables au terme de la Toussaint par le maniere qui sensient et *Primes* H. de la F. tient de my a la cause ditte demie mesure de courtil ou environ listant cest a ma terre et cest a le ruelle et men doit seize sols parisis chascun an audit terme de la Toussaint. Item. le dit H. tient encore demie mesure et treize verghes de manoir ou environ listant cest a ma mesure aboutant zud au quemin et men doit chascun an au dit terme maille poitevine

et deux sols six deniers parisis au jour St. Martin d'Iver. Item. J. de la F. tient de my demie mesure et treize verghes de manoir ou environ alistant a le ruelle que maine de Quelmes a hadsoit aboutant zud a le rue et men doit maille poitevine au dit terme de la Toussaint et deux sols six deniers parisis au dit jour de St. M. d'Iver. Item. J. de C. tient de my trois quartiers de courtil ou environs alistant cest a le ruelle aboutant nort au quemin et men doit chascun an au dit jour de Toussaint un denier parisis. Item. L. de Ruminghem tient de my une mesure de terre ou environ seant a Bracqueberg alistant west au fief gilles de Ruminghem et men doit un quartier d'avaine au dit jour de Toussaint. Item. W. B. tient de my chincq quartiers de terre et demi ou environ gisant au dit lieu de Bracqueberg alistant west au dit loy de Ruminghem et m'en doit chascun an un biguet et demi d'avaine et un denier parisis au jour de Toussaint. Item. B. le S. tient de my ung quartier et demi de terre ou environ gisant au dit lieu alistant west a C. B. et m'en doit picotin et demi d'avaine au dit jour de Toussaint. Item. J. de Ruminghem dit le Saige tient de my ung quartier de terre et demi ou environ aboutant cest a B. le S. et men doit chascun an au dit jour un biguet et demi d'avaine. Item. B. de Ruminghem tient de my ung quartier et demi de terre ou environ alistant west a J. de Ruminghem dit le Saige et m'en doit au dit jour ung picotin et demi d'avaine. Item. Il y a plusieurs personnes qui tiennent de my onze mesures de terre ou environ joignant ensemble aboutant zud a le ruelle et nort a le terre de mes dis seigneurs nomme le hartlant dont ils me doivent au dit jour chincq quartiers d'avaine ung picotin, petite mesure et deux deniers parisis. Item. tiennent encore trois mesures et demie de terre ou environ gesant a Oultreval aboutant cest a le terre W. B. et m'en doivent chascun an de rente onze picotins d'avaine petite mesure. Item. encore quatre mesures et demi ou environ gesant a Equendal aboutant zud au fief filles de Ruminghem et m'en doivent chascun au dit jour chincq deniers parisis. Item. B. de Monechove en tient ung courtil trois quartiers ou environ alistant a le rue zud a gille de Ruminghem et m'en doit chascun au dit jour une maille poit. Item. quinze mesures de terre ou environ que tiennent plusieurs personnes gesant entre le viel flos et zud Bordenghem tenant vers cest au quemin du moulin et vers cest a le terre M. le N. et m'en doivent chascun an chincq rasieres et ung quartier d'avaine petite mesure, ung quartier et demi picotin de blé et une gline au dit jour. Item. E. W. en tient six quartiers de

terre ou environ gisant a Troisart alistant nort a J. de Prevost, aboutant cest a la terre L. B. et ne m'en doit aultre chose que droiture s'il le vendoit. Item. J. de P. tient de my demie mesure de terre ou environ gesant a Troisart alistant zud a E. W. aboutant cest a le tenance de G. de Ruminghem et ne m'en doit aultre chose que droiture s'il le vendoit. Duquel mon dit fief jay toute justice fonsiere et de basse visconte avœcq toutes amendes de soixante sols parisis et au dessous et tous telz drois que a telle justice doivent appartenir selon le coustume du pays et du lieu et aussi jay un Bancq que on dit Estant et sont tenus de payer tous mes dis tenans Relief quand le cas y esquiet le double qu'ils doivent de rente jugier au dit Bancq a le maniere accoustumée s'il advenoit que aucuns de mes dis tenans vendesissent aucun de leurs tenemens ils seroient tenus de le passer et werpir par devant my mon baille ou son lieutenant (et) le dit Bancq et m'en payer pour les droitures le dixieme denier de le rente et le relief tel que dit est et s'il estoient en deffault de my payer la ditte rente au dit jour de la Toussaint ils seroient chascuns tenus envers my en amende de trois sols parisis et sept sols parisis les depens de men bailli et de me ditte loy ou bancq quand je le irois pander pour les dis arreraiges du quel fief je dois a mes dis seigneurs les Religieux Abbe et Couvent cent sols parisis de relief quand le cas y esquiet et cambrelaige coustumier.

Et le Second Fief s'estend en trois rasieres de ble aussi bon que de le disme de Quelmes que my doivent chascun an paier heritablement mes dis seigneurs les Religieux au jour et terme de St. Miquel, le quel ble je preng et ay accoustume de prendre sur le disme de Quelmes. Du quel fief je doy a mes dis seigneurs relief de le valeur du dit fief pour ung an quand le cas y esquiet et cambrelaige coustumier.

Item le Tierch Fief que je tieng de mes dis seigneurs se comprend en trois mesures et demie de terre gesant dessous Westhove en la paroisse de Quelmes aboutant vers cest a A. le M. et le tiennent plusieurs gens et m'en doivent chascun de rente six quartiers de blé et une gline au jour St. Andrieu. Item. en deux mesures et demie de terre gesant a le Tromme damont le quemin qui maine de Quelmes a Zetteque joignant vers nort a J. le W. et m'en doit au terme de St. Andrieu demie rasiere de ble. Item. en une aultre pieche de terre gesant a la ditte Tromme vers nort a mes dis seigneurs aboutant vers west au quemin qui maine de Quelmes a Zetteque et m'en doit en chascun an au dit jour de le St. A. demi quartier de ble. Item, en une

mesure de terre gesant en un lieu nommé le Winele alistant vers nort a le terre J. de Ruminghem dit le Saige, aboutant zud au fief J. W. et de ce my doit en ung quartier d'avaine grande mesure au jour de St. Miquiel. Item. en six quartiers de terre gesant a Dicquelo listant vers zud a J. M. de Ruminghem desquels six quartiers je tieng le moitie en mon domaine a my esqueues par le mort d'un bastard et de l'autre moitie on m'en doit six picotins d'avaine et une maille poit a le St. Miquiel grande mesure. Item. L. de Ruminghem en tient une pieche de terre aboutant vers zut a la terre J. de Ruminghem et m'en doit au jour de le St. M. chincq deniers parisis. Item. en tient D. de Saulperwick a cause de sa femme six quartiers de terre gesant a Wissart listant zut au fief J. de W. et vers nort aux hoirs J. D. et m'en doit un denier parisis chascun an au jour St. A. Duquel fief j'ay toute justice fonsiere et basse viscomté comme j'ay en mon premier fief dessus dit et telz drois qu'il y appartient amendes de soixante sols parisis et au dessous aveucq un Bancq des dis hommes qui tiennent de my a le cause dycelle fief que on dit et nomme Bancq seant et bailli quand necessité en est. Duquel fief je doy pour relief quand le cas y esquiet et le valeur dycelle pour ung an et Cambrellaiage coustumier.

Item le Quart fief que je tieng de mes dis seigneurs s'estend et comprend en chincq mesures et demie de terre ou environ gesant a Oupersat en deux pieches tenant du costé zut et nort a B. de M. alistant nort a le terre de J. de Clarque. Duquel fief je doy pour relief quand le cas y esquiet le valeur pour ung an et Cambrellaiage coustumier.

Item le Chincquisme fief se comprend en un droit que lon dit et nomme Le Prevoste de Quelmes et d'Acquin a cause duquel fief au commandement du Bailli de mes dis seigneurs je assemble leurs eschevins et sieet avœuc eulx es dis lieux de Quelmes et d'Acquin et au commandement du dit Bailli je conjure les dis eschevins et quand aucunes admendes de soixante sols sont jugiés par eulx es dites courts je y ay et preng de mon droit a cause de mon dit fief trois sols parisis et es amendes de trois sols douze deniers parisis et quand le cas esquiet que les dis eschevins font aucun explois il convient que je y soit evoequié avœcq eulx et quant il ont saliare de sept sols je preng en iceulx sept sols pour mon droit deux sols et a passer aucunes chartres ou werps je et les dis eschevins y avons quatorze deniers dont je ay mon droit quatre deniers et tous autres drois que a telle prevosté appartient.

## II. DISTRICT DE ST. OMER

## CANTON D'EQUERDES

## MUNICIPALITÉ DE WIZERNES

From '*Biens nationaux*', Arch. Dép. Arras

État des biens nationaux existant dans le terroir de Wizernes dressé par la municipalité du dit lieu sur la demande de Messieurs du Directoire du District de St. Omer suivant leur Lettre du trente avril 1790.

La veuve et enfans de Bernard Ducrocq occupent à titre de location de l'Abbaye de St. Bertin les parties suivantes.

## 1.

Premièrement quatre mesures un quartier dix verges de terre au chemin du Brule listant de mer à cinq quartiers, de midy a six mesures, d'un bord d'occident a vingt mesures de terre de St. Bertin, et d'orient a six autres mesures de St. Bertin.

## 2.

Trois mesures et demie Seitué a la Creuse ou chemin d'Esquerdes listant d'occident a sept mesures de St. Bertin et aux heritiers de Matthieu Derain, d'orient et d'un bord de midy a trois mesures de St. Bertin, d'un bord ver mer au chemin d'Esquerdes.

## 3.

Cinq mesures un quartier de terre a la verde voie du Calpÿ tenant d'occident a trois mesures de St. Bertin, d'un bord vers mer a quatre mesures de M. Dugiméral.

## 4.

Trois mesures cinquante-six verges a la verde voie du Calpÿ tenant du cotté d'orient d'occident aux enfans de Martin de Ruminghem, d'un bord vers mer au presbytaire d'hallines, de midy au Sieur Duclaire.

## 5.

Dix mesures trois quartiers vingt verges de terre au dit Calpÿ listant de mer à cinq mesures, de midy à cinq mesures, de midi à cinq autres mesures de St. Bertin, d'orient à la verde voie d'occident aux ayant cause du marquis de Lelendant.

## 6.

Huit mesures soixante-deux verges et demie au dit lieu ou verde voie listant d'orient à la ditte verde voie, d'occident a Louis Le Clercq, vers mer à huit mesures de St. Bertin, et d'autre bord aux ayant cause du Marquis de Lelendant.

## 7.

Cinq quartiers de terre au mulant listant d'orient a huit mesures de St. Bertin, d'occident à l'hospital de St. Louis, d'un bord nord aux heritiers de Marie Helain Robbe, de midy a Mr. Devisery.

## 8.

Huit mesures trois quartiers seize verges de midy à huit mesures de St. Bertin, de mer Sieur Foubert, d'un bord d'orient chemin du Calpÿ, d'occident les heritiers d'Helain Robbe.

9.	2 m.	1 q.	11 v.	31.	2 m.	3 q.	0 v.
10.	13	2	3	32.	3	2	9
11.	1	0	10	33.	3	0	0
12.	4	0	6	34.	3	0	0
13.	3	3	20	35.	7	0	0
14.	6	0	13	36.	6	2	4
15.	1	3	8	37.	1	3	12
16.	7	0	5	38.	3	2	16
17.	0	3	12½	39.	2	2	0
18.	6	2	11	40.	0	2	0
19.	3	0	10	41.	0	2	0
20.	11	2	11	42.	1	0	20
21.	2	2	0	43.	2	2	0
22.	3	2	5	44.	3	1	20
23.	11	0	14	45.	1	3	0
24.	2	2	20	46.	2	2	0
25.	3	0	18	47.	3	0	8
26.	8	0	0	48.	3	0	12
27.	1	2	22	49.	17	2	23
28.	4	1	21	50.	1	3	20
29.	1	1	0	51.	1	2	12½
30.	3	3	18				

Nicolas François Clenet occupe de l'Abbaye de St. Bertin une ferme dont la declaration suit.

## 52.

Trois mesures de manoiré amazé d'une ferme listant de midy à la riviere d'Aa, de mer à M. Degemont et à un sentier, d'un bord d'orient a une Ruelle, et d'occident aux heritiers de Martin P.

## 53.

Dix neuf mesures de pature et terre labourable vis a vis la ferme listant de mer à la riviere, de midy a la montagne d'Helfaut, d'orient au chemin de la Commune, et d'occident au Cimetière et d'autres.

54.	1 m.	3 q.	10 v.	78.	2 m.	2 q.	8 v.
55.	3	0	0	79.	0	3	0
56.	1	0	0	80.	5	1	0
57.	9	2	16	81.	13	3	0
58.	1	1	0	82.	21	1	0
59.	7	3	0	83.	4	0	4
60.	20	0	0	84.	2	0	9
61.	0	3	0	85.	4	0	0
62.	5	0	12 $\frac{1}{2}$	86.	1	1	16
63.	11	3	16	87.	4	2	0
64.	3	2	16	88.	1	1	18
65.	4	1	12	89.	6	1	3
66.	5	2	17	90.	22	2	18
67.	3	0	5	91.	4	0	0
68.	3	3	0	92.	9	2	13
69.	1	2	12 $\frac{1}{2}$	93.	1	3	0
70.	2	2	0	94.	2	3	5
71.	8	0	7	95.	1	0	12
72.	3	0	23	96.	2	2	6
73.	1	3	23	97.	1	2	0
74.	4	3	19	98.	0	1	8 $\frac{1}{2}$
75.	5	1	0	99.	0	1	0
76.	7	2	22	100.	0	5	0
77.	3	2	0				

## 101.

Marie J. E. occupe a titre de ferme de l'Abbaye de St. Bertin un moulin a l'usage de moudre blé seitué au pont dardenne avec trois quartiers de preÿ listant d'amont a la petite Riviere d'ouest a la grande riviere, de midy a la ditte Abbaye, et d'occident a M. D.

## 102.

Six quartiers preÿ.

## 103.

La ditte abbaye posede encorre un moulin a l'usage de tordre huile, avec trois quartiers de preÿ.

La ditte Abbaye de St. Bertin posede sous le titre d'aumonerie de St. Bertin les parties suivantes :

104.

Deux mesures de prey.

105.	o m.	3 q.	o v.	108.	o m.	3 q.	o v.
106.	o	1	o	109.	o	2	o
107.	o	2	o	110.	o	1	o

Total cinq mesures occupe par J. F. H. et P. L.

111.

Les Dominicains de St. Omer posedent deux mesures et demi de pature tenant d'occident et de midy a la riviere de mer et d'orient à M. D. occupé par la veuve B. D.

A. L. occupe de l'hopital de la Maladrerie les parties suivantes.

112.

Cinq mesures listant ver soleil a J. F. D., ver mer à St. Bertin, d'occident a G. F., d'orient aux Religieuses Repenties.

113.	2 m.	1 q.	o v.	118.	2 m.	2 q.	o v.
114.	2	3	o	119.	1	2	o
115.	2	3	o	120.	o	3	o
116.	1	3	o	121.	4	o	o
117.	4	o	o	122.	o	3	o

La veuve J. L. demeurant à Blendecques occupe de l'hopital de la Maladrerie les parties suivantes.

123.	1 m.	1 q.	10 v.	126.	1 m.	1 q.	11 v.
124.	2	1	16	127.	o	3	o
125.	o	1	o	128.	o	3	o

Les quatre articles precedent sont seitué au terroire de Sainte Croix.

129.	1 m.	o q.	o v.	131.	18 m.	o q.	o v.
130.	o	2	2	132.	o	2	12 $\frac{1}{2}$

Le sieur F. L. occupe des Religieuses de la Magdelaine dites Repenties les parties suivantes.

133.

Deux mesures de terre au chemin de la Coupe alistant vers soleil a St. Bertin, de mer a M. D. d'orient et d'occident à St. Bertin.

134.

1 m. o q. o v. Total trois mesures faisant partie d'un marché de quarante-huit mesures dont le surplus est au terroir de Sainte Croix.

C. B. D. occupe des dames urbanistes de St. Omer dites Riches Claires les parties suivantes.

135.

Cinq quartiers au chemin du Brulle listant de midy a A. M. de mer aux penitentes, d'occident au chapitre, d'orient a 6 q. de l'église de Longuenesse.

136.	o m.	3 q.	o v.	143.	o m.	3 q.	o v.
137.	1	1	o	144.	o	2	o
138.	o	2	o	145.	2	1	12½
139.	1	2	o	146.	o	3	o
140.	o	2	o	147.	2	o	o
141.	o	3	o	148.	1	1	o
142.	o	2	o				

P. F. et G. H. occupent des religieux dominicains de Douay :

149.	2 m.	o q.	o v.
150.	o	1	12½
151.	o	3	12½

L. D. à Blendecques occupe des Religieuses penitentes les parties suivantes.

152.	3 m.	o q.	o v.
153.	1	o	o

Les enfants B. D. du chapitre de St. Omer ou de la Chappelle de Notre-Dame des Miracles :

154.

8 m.

L. D. du Collège Français de St. Omer.

155.

2 m. 2 q.

des pères Chartreux.

156.	1 m.	1 q.	o v.
157.	o	3	o
158.	1	o	o

L. Demolle.

159.	des Ursellines de St. Omer	5 m.	o q.	o v.
160.	du Couvent de St. Margueritte	1	2	o
161.	"	2	2	o
162.	"	1	o	o

Voilà messieurs la declaration des biens nationaux seitués dans  
notre terroire qui sont a notre connoissance et sommes avec respect.

Le maire et officiers municipaux de Wizernes.

DENEUVILLE

Secretaire.

### III. EXAMPLES OF LAND-MEASURES

From Berode, *op. cit.*, pt. II.

(a) IN THE REGION OF ST. OMER

<i>Place.</i>	<i>Subdivision of measure.</i>	<i>Area in ares and centiares.</i>
Aire	100 rods of 20 feet of 11 inches	35 46
Ardres	100 " 20 " 12 "	42 20
	100 " 20 " 11 "	35 46
Andruick	300 " 14 " 10 "	43 08
Bomy	100 " 22 " 11 "	42 91
	100 " 20 " 11 "	35 46
Boulogne	100 " 22 " 11 "	42 91
	100 " 20 " 12 "	42 20
Béthune	400 " 10 " 11 "	35 46
	450 " 10 " 11 "	39 90
Calais	100 " 20 " 12 "	42 20
Gulnes	100 " 20 " 12 "	42 20
Mouille	100 " 20 " 11 "	35 46
Marquise	100 " 20 " 12 "	42 20
Nouvelle-Eglise	100 " 20 " 12 "	42 20
	100 " 22 " 11 "	42 91
Ruminghem	300 " 14 " 10 "	43 08
St-Omer	100 " 20 " 11 "	35 46
St-Folquin	300 " 14 " 10 "	43 08
Bourbourg	300 " 14 " 10 "	43 08
Bergues	300 " 14 " 10 "	43 08
Dunkerque	300 " 14 " 10 "	43 08
Ledringhem	425 " 10 " 11 "	37 67

(b) IN THE CANTON OF MAUBEUGE

<i>Place.</i>	<i>Land-Measure.</i>	<i>Area in ares and centiares.</i>
Assevent	Journel	47 50
	Bonnier	1 41 50
Beaufort et Bersillies	Journel	47 50
	Bonnier	1 41 50

<i>Place.</i>	<i>Land-Measure.</i>	<i>Area in ares and centiares.</i>	
Bettignies	Journal	42	20
	Bonnier	I 26	61
Boussois, Cerfontaine, Colleret	Journal	47	14
	Bonnier	I 41	42
Damousies et Eclaibes	Journal	45	92
	Rasière	27	55
	Bonnier	I 37	76
Elesmes	Bonnier	I 41	68
Ferrière-La-G <sup>de</sup>	Journal	47	14
	Bonnier	I 41	68
Ferrière-La-P <sup>te</sup>	Journal	47	14
	Bonnier	I 41	68
Gognies-Chaussée	Journal	42	20
	Bonnier	I 26	61
Hautmont	Journal	44	44
	Rasière	27	55
	Bonnier	I 37	76
Jeumont	Journal	32	20
	Bonnier	96	62
Lameries	Journal	39	06
	Bonnier	I 17	17
Limont-Fontaine	Journal	45	92
	Rasière	27	55
	Bonnier	I 37	76
Louvroil	Journal	47	50
Mairieux	Journal	47	64
	Bonnier	I 41	64
Marpent	Journal	32	20
	Bonnier	96	62
Maubeuge	Journal	47	14
	Bonnier	I 41	63
Obrechies	Journal	45	92
	Bonnier	I 37	76
Ostregnies	Journal	40	17
	Bonnier	I 20	41
Quiévelon	Journal	44	42
	Bonnier	I 33	26
Recquignies	Journal	42	20
	Bonnier	I 26	61
St-Remi, Mal bâti	Journal	45	92
	Rasière	27	55
	Bonnier	I 37	76
Rocq et Rousies	Journal	47	14
	Bonnier	I 41	63
Vieuxrengt	Journal	36	16
	Bonnier	I 08	50
Villers-Sire-Nicole	Journal	37	97
	Bonnier	I 13	91
Wattignies	Journal	42	91
	Bonnier	I 37	76





# INDEX

Aa, River, 101.  
 Acquin, 49.  
 Adeldard of St. Bertin, 26.  
 Adroaldus of Théroutanne, 16.  
*Advocati*, 28, 30 ff.  
*Affranchissement*, 107 f.  
 Agriculture, 22, 117-26.  
 Alexander III, 48, 102.  
*Ancilla*, 21.  
 Andres, Abbey of, 101, 103.  
 Arkas, 31.  
 Arnulfus, Marquis, 35.  
 Arques, 36, 53, 107.  
 Arras, 50, 55, 57, 106.  
 —. *See also* St. Vaast.  
 Artois, 12, 15, 28, 61, 100.  
 —, *Cahiers* of, 56.  
 —, *Coutume* of, 125.  
 Assumption, Feast of, 114.  
 Atcona, 20.  
 d'Auchy, Cartulary of, 148.  
 d'Avenel, cited, 95.  
 Avesnes, 136.  
 Avocrie, 99.  
 — of Beuvrequen. *See* Beuvrequen.

Baetsheve, 122.  
 Baldwin, Count of Flanders, 31, 32, 36,  
 58, 76, 98.  
 Baldwin Iron-Arm, 28.  
*Banalités*, 30, 56 ff., 148.  
*Bans*, 125.  
 Bapaume, 53.  
 Barley, Rents in, 81.  
 Basinghem, 115.  
 Beaulieu, Abbey of, 35, 38, 43, 69.  
 Beauvais, Bishop of, 28.  
 Belgium, devastated by Normans, 27.  
*Beneficia*, 30.  
 Bernevilla, 67 f.  
 Berthod, Dom Anselm, 5.  
 Beuvrequen, 73 ff.  
 —, Terrier of, 35, 39 ff., 42, 73.  
 —, Holdings at, 76 ff.  
 —, Abbey farm at, 77.  
 —, Rents at, 78 f.  
 —, Canal at, 102.  
 —, Avocrie of, 110-16.  
 —, Agriculture in, 118.  
 —, Population of, 120.

*Biens nationaux*, 6.  
 Bigartio, 43, 69, 132.  
*Boiteau*, 138.  
*Bonnier*, derivation, 127.  
 —, geographical distribution, 128 f.  
 —, estimate of, 129 f.  
 —, of St. Bertin, 130 f.  
 —, since the Revolution, 136 f.  
 Boulonnais, 12, 15, 101, 124.  
 Bourbourg, 102.  
*Bourgeoisie*, Right of, 106.  
 Breviatio of A.D. 850, 17, 49, 61, 91,  
 101, 128, 131.  
 Broburg, 48.  
 Brokerke, 47.  
 Bunarium, 130.  
 Butter, Rent in, 117.

Cadwalla, King of Wessex, 16.  
 Calais, 48.  
 Calmont, 31.  
 Calvasart, 34.  
 Canals, 102.  
 Capet Dynasty, 26, 28.  
*Cartulaire*, *Grand*. *See* *Grand Cartu-  
 laire*.  
*Casa*, 99.  
 Cash, Rents in, 82 f.  
*Caschie*, 53.  
*Censuarii*, 88 f.  
*Centième Rôles*, 6.  
*Champart*. *See* *Terragium*.  
 Charlemagne, 24 ff., 55, 129.  
 Charles the Bold, 28.  
 Charles the Good, 105.  
 Chartres. *See* St. Père.  
 Cheese, as Rent, 117.  
*Chevaie*, 95, 106.  
 Clairmarais, 53, 101.  
 Clito, William, Count of Flanders, 105.  
*Clocher*, *Droit de*, 125.  
 Cloth, Manufacture of, 107.  
 Colaco, 79.  
 Columella, 129.  
 Common Pasture, 61, 74.  
 Communes, 105 f.  
 Contract, 24, 86 f., 88 ff.  
 Corbie, Abbey of, 15, 66, 128.  
 Corn, Rents in, 81, 84.  
*Corvées*, 32, 41, 42 ff., 95.

- Cottiers*, 124, 143.  
 de Cuhem, Eustace, 118.  
*Curtile*, 38, 42, 66.  
 Custom, 24, 86 f., 88 ff.  
  
 Dainville, 72.  
*Défrichements*, 100 ff., 107.  
 Demesne, 19, 44, 88.  
*Dénombrements*, 119, 141-6.  
*Dîmage*, 148.  
 Dispersion, 120 f., 149.  
 Domain. *See* Demesne.  
*Domaine rural*, 148 f.  
*Domus*, 39.  
*Droit de Clocher*. *See* *Clocher*.  
 Ducange, cited, 127.  
 Dunkirk, 66.  
  
 Edenenas, 22.  
 Edmund, Prince of England, 90.  
 Enclosure, 124.  
 Éperlecques, 6.  
 Escalles (Escale), 36, 97, 107.  
*Étalage*, 52.  
 Étaples, 53, 58, 60.  
 Eustace de Cuhem. *See* Cuhem.  
 Excommunication, 59.  
  
*Familia*, 94.  
*Forsenga*, 74, 83.  
 Feudalism, 24 ff., 30.  
 Fish-tithe. *See* Herring-tithe.  
 Fishing, Right of, as *Banalité*, 59.  
 Flanders, Counts of, 28, 48, 54, 58, 92, 101, 105.  
 —, Communes of, 105.  
 Floods. *See* *Flottage*.  
*Flottage*, 117.  
 Fontaine les Hermans, 17.  
 Fontainebleau, 13.  
*Forage*, 50.  
 Foulquin, Cartulary of, 17, 18, 25, 92, 128, 130.  
*Fournier*, 60.  
 Fraxino (Fresnes les Montauban), 69.  
*Fresinga*. *See* *Forsenga*.  
 Fuel, 117.  
 Furnace. *See* Oven.  
*Furnum*. *See* Oven.  
  
 Gabelle, 63.  
*Gaverella*, 68.  
 Gerbodo, Advocatus, 31.  
 Gobet, Nicolas, 5.  
 Godfried, 25.  
*Grand Cartulaire*, 5, 6, 36, 52, 102, 108.  
 Gravelines, 48, 53, 54.  
 Gregory of Tours, 26.  
 Grénèterie, 6.  
  
 Guérard, Benjamin, 129 ff.  
 Guimann, Cartulary of, 35, 38, 43, 51, 63, 65 ff., 75, 104.  
 Guines, Counts of, 27, 28, 36, 37, 54, 97, 103, 107, 132.  
 —, *Contums de*, 126.  
 Gundebertus, Testament of, 128.  
  
 Haignière, Abbé, 6.  
 Hainault, Counts of, 76.  
 Hautmont, Monastery of, 15.  
 Havet, Hugo, d'Albiniaco, 32.  
*Herescartii*, 21.  
 Herring-tithe, 47 f.  
 Heuchin, 60, 70.  
*Homines*, 93.  
*Hospites*, 28, 93, 103 ff.  
*Hostagium*, 39, 74 f.  
 Hounds, 75.  
 Hundred Years' War, 107.  
 Huns, 24.  
  
*Incrementum*, 69.  
 Industry in Villages. *See* *Villa*.  
*Ingenus*, 20, 21, 91 f.  
*Ingenusilis, Mansus*. *See* *Mansus*.  
 Inheritance, 86.  
 Irminon, St. *See* *Polyptyque*.  
*Itius, Sinus*. *See* *Sinus*.  
  
 John, King, of France, 53.  
*Journal*, 131 f., 136.  
 Juvenel, 72.  
  
 Kelmis of 850, 30.  
*Kenre*, 105.  
*Kien-Avene*, 75 f.  
  
 Labour, in *Villa*. *See* *Week-work*.  
 Lambert of Ardres, 101.  
 Lambert, Son of Odo, 31.  
 Land-Measures, 127-40, 159 f.  
 Licques, Abbey of, 50, 103.  
*Lignes*, 132.  
 Longnon, Abbey of, 130.  
 Loningahem, 46, 115.  
 Loon, 48.  
 Louis the German, 26.  
*Luminarii*, 21.  
*Lunarii*, 21.  
  
*Maire*, 31.  
*Managium*, 39.  
 Manasses, Count of Guines, 96.  
*Mancipium*, 21, 91 f.  
*Mansus indomiticatus*, 18, 21.  
 — *ingenusilis*, 19.  
 — *servilis*, 19, 94.  
 — after 900, 35-44, 66.  
 Mari, 117.

Marquise, 12, 115.  
 Marriages, Mixed, 111.  
*Massif Central*, 12.  
 Matthew, Count of Boulogne, 48.  
 Maubeuge, Jean de, 76.  
*Medietaris*. See *Mitayers*.  
 Mellenz, 57 f.  
*Mencaudé*, 132, 136.  
 Merke, 93.  
*Mts*, 38.  
*Mesure*, 132, 136.  
*Mitayers*, 69, 90.  
 Metric system, 135.  
 Mill, Banalité of, 56 ff., 74.  
 Moeres, Marshes of, 101.  
*Molura*, 58.  
 Monchy les Neuville, 59.  
 Monopolies of trade, 49 ff.  
*Morcellement*, 30, 37, 46, 55, 85 f., 119 f., 139, 145.  
 Morini, 15, 35, 102.  
 Morningahem, 22.  
*Moutonnagium*, 74, 83.  
 Muley, D., 129.  
  
 Nieuport, 48, 53.  
*Nord, Département du*, 136 ff.  
 Normans, Invasions of, 24, 25 ff.  
 Nova Villa, 60.  
*Novals*. See *Tithes*.  
  
 Oats, Rents in, 80, 85.  
*Octroi*, 52.  
 Odo, Advocate, 31.  
 Open fields, 121 ff.  
 Oreyneay, 71.  
 Ostroeld, 34, 93.  
 Oven, Banalité of, 60, 74.  
  
*Parcours*, 125.  
 Parish. See *Parochia*.  
*Parochia*, 33, 148.  
 Pas-de-Calais, 136 ff.  
 Pascalanda, 19.  
*Pasteur*, 126.  
*Pastura inculta*, 130.  
 Pasture, Common. See *Common*.  
 Paul, Monk, of St. Père de Chartres, 27, 131.  
 Payments, for Rights of Usage. See *Usage*.  
*Plage*. See *Pedagium*.  
*Pedagium*, 50, 52 f.  
 Pelven, 69.  
 Pence, Payments of, by Reapers, 72.  
 Peterneze, 48.  
 Philip of Alsace, 106.  
 Philip of Flanders, 54.  
*Pinte*, 138.  
*Plans Cadastraux*, 6.

Plough-teams, 44.  
*Polyptyques of the Ninth Century*, 93 f.  
*Polyptyque d'Irminon*, 99, 128, 129.  
 Poperinghe, 17, 19, 31, 55, 97, 102.  
*Poquin*, 79.  
*Præpositus*, 97, 102.  
*Pratum*, 130, 132.  
 Priest, Offerings to, 49.  
 Produce of land, in Middle Ages, 84.  
*Prouvre*, 57.  
  
 Quelmea, 6, 18, 46, 57, 121, 124, 145, 149-53.  
 Questrecques, 69.  
  
*Rapports*, 141-6.  
*Rasière*, 136 ff.  
 Reapers, Payments by. See *Payments*.  
*Redemptionem, Ad*, Land held, 71 f.  
 Reeds, Payments of, 72.  
*Relevatio*, 68, 70, 87, 89.  
 Relief. See *Relevatio*.  
 Rents, 78 ff., 117.  
 Rincart, 71.  
 Robert le Frison, 28.  
  
 Saint Aubin, 136.  
 Saint Bavon, 27.  
 Saint Bertin, 15.  
 — —, Abbey of, Records of, 5 ff.; foundation, 15, 16; early history, 17; invaded by Normans, 25; defended by Baldwin, Count of Flanders, 31; *theloneum* at, 52; *banalities* of, 57; *mansus* of, 66; serfdom in, 96 ff.; agreement with Eustace de Cubem, 118; *bonnier* of, 130.  
 Saint Ebertran, 15, 16.  
 Saint Irminon. See *Polyptyque*.  
 Saint Josse, Abbey of, 48.  
 Saint Lambert de Liège, Charters of, 128.  
 Saint Mommelin, 15, 16.  
 Saint Omer, District of, 11, 50, 92, 95, 107, 154-9.  
 — —, Records of, 5-7.  
 — —, Gulf of. See *Sinus Itius*.  
 — —, Monastery of, 27, 32, 47, 52, 59, 69.  
 — —, Commune of, 105.  
 — —, Atlas of Tithes, 121.  
 Saint Père de Chartres, Monastery of, 15, 27, 128.  
 Saint Pol, House of, 28.  
 Saint Rictrudis, 32.  
 Saint Trond, 53, 59, 108, 133 f.  
 Saint Vaast at Arras, 16, 27, 35, 38, 43, 53, 58, 60, 104.  
 — — —, Villages of, 63 ff.  
 — — —, Lands of, 65 ff.  
 Saint Vedast, Abbey of, 51.

Saint Wulmer, 15, 27.  
 Sales of holdings, 87.  
 Samer, Abbey of, 15, 16, 27, 55.  
 Sée, M., cited, 84.  
 Serfdom, 23, 94 ff., 147.  
*Servi*, 20, 21, 91 f., 110.  
 Servin, 67.  
*Sexteragium*, 51.  
*Silva grossa*, 130.  
*Silva minuta*, 130.  
*Sinus Itius*, 13.  
 Sitdin, 16, 17.  
 Slavery, Personal, 93 f.  
*Societatem*, *Ad*, Land held, 69 f.  
*Socionarii*, 102.  
*Societas*, 69.  
 Status, 91 ff.  
 Subleases, 89.  
*Submanentes*, 93, 98.  
 Symencourt, 69.  
  
 Tasks and payments, 20.  
*Terra arabilis*, 130, 132.  
*Terra dominica*, 18, 42.  
*Terragium*, 69, 70 f.  
*Thaloneum*, 50 ff., 66.  
 Theodoric the Villicus, 70.  
 Thérouanne, 15, 18, 27, 28, 34, 36, 52.  
 Tithes, 46 ff., 63, 102.  
 —, Atlas of. *See* Saint Omer.  
*Tonagium*, 51.  
*Tonlieu*, 50, 55 ff., 63, 74.  
 Trade, Monopolies of. *See* Monopolies.  
*Traversum*, 53 f.  
*Trefois*, 122.  
 Tubersent, 146.

## Usage, Rights of, 61 f.

*Vaine pature*, 124 f., 149.  
*Vakier*. *See* *Vaquier*.  
 Valenciennes, 138.  
*Vaquier*, 61, 126.  
*Verge*, 37.  
 Victor, Bishop of the Morini, 35.  
 Villa, Outfit of, 18.  
 —, Tasks and payments in, 20.  
 —, Personnel of, 21 f.  
 —, Agriculture in, 22.  
 —, After the Ninth Century, 30 ff.  
 —, Church of, 49.  
 —, Common of. *See* Common Pasture.  
 —, Industry in, 106 ff.  
*Vingtième Rôles*, 6.

Waesland, 14.  
*Walledeniers*, 75, 83.  
 Waskingham, 75.  
 Watten, 57.  
 —, Chronicles of, 13.  
 Weavers, 107.  
 Week-work, 20, 33, 41, 43, 148 f.  
 Wheat, Rents in, 80.  
 William XI, Count of Boulogne, 58.  
*Winsaine*, 75.  
 Wisques, 17.  
 Wissant, 53, 54.  
 de Witte, Dom, 5.  
 Wizernes, 37, 57, 90, 119, 126.  
  
 Yser, 68, 69.  
 Zola, 87.







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